THE CONVEYANCER AND PROPERTY LAWYER

VOL. 13, No. 1 SEPTEMBER, 1948

CONVEYANCER'S NOTEBOOK

Fixing the Dates of Hearing for Witness Actions.—We have been asked particularly to call the attention of the profession to the introduction in the Chancery Division of an experimental attempt to fix the dates of hearing of witness actions. This experiment arises out of the insistent demand to lower the cost of litigation and secure greater efficiency, and both the profession and non-legal associations have pressed for the need of fixed dates to this end in evidence before the Evershed Committee. The Chancery Judges have, therefore, offered to try the experiment in the Chancery Division as involving less complication than in other Divisions. Master Holloway will act as Master in Charge of the Chancery Witness List and will be solely responsible for the settling of the Witness List.

It is scarcely necessary to point out the importance of this experiment to any practitioner. As conveyancers we are mercifully rarely concerned with witness actions, but costly litigation reacts unfavourably against the whole profession. There can be no question but that popular feeling is more than usually of opinion that justice is too dear. Whatever may be done in fulfilment of the Rushcliffe Report this will, in all probability, barely touch more than the fringe of the problem since relatively few ordinary litigants will fall within the class to which the relief there granted applies.

It is, of course, rare for the layman to realise what proportion of the costs of litigation represent profit costs payable to the practitioner and, of course, still fewer distinguish brief fees from solicitor's fees. This makes it all the more important that the cost of litigation which involves no gain to anyone (for witnesses are usually losers alike with litigants) should be reduced in every possible way. Therefore, although it is not usual in this *Journal* to deal with matters of litigation in detail, we print the practice direction in full below :—

" 1. On and after the 12th October, 1948, no cause or matter set down in the Witness List in the Chancery Division will be heard unless a date has previously been fixed for its hearing by the Master in Charge of the Chancery Witness List (hereafter referred to as the Master in Charge).

"2. On and after the 19th July, 1948, any party or his solicitor may, at any time after setting down, on giving four clear days' notice in writing to all other parties, attend before the Master in Charge at Room No. 154, Royal Courts of Justice, Strand, W.C.2, to make application to fix a date for trial or to confirm and record a date fixed by a Judge before the 19th July.

"3. Parties or their solicitors wishing to apply to fix or confirm and record a date for trial should communicate with the Cause Clerk in Room No. 136 (telephone Holborn 7641, Ex. 187) and make an appointment to attend before the Master in Charge. In order not to prejudice parties to actions which are set down before the 19th July, 1948, appointments to attend before the Master in Charge will be made as far as possible in the order in which those actions have been set down.

"4. Upon any such application each party or his solicitor will be required to hand to the Master in Charge a note signed by himself stating the number of witnesses the party proposes to call, his own estimate of the length of hearing in hours and an indication of the quantity of documents in the case. If Counsel has already advised on evidence or been briefed, Counsel's estimate of the length of hearing shall be included in the said note. Solicitors attending upon any such application will be expected to know which dates are convenient to all persons concerned, including witnesses and counsel.

"5. No costs of counsel will be allowed for attending an application to fix a date for hearing.

"6. When a date has been fixed by the Master in Charge it will not be altered save in exceptional circumstances upon application being made to him after four clear days' notice in writing has been given to all other parties; and, except by his direction, no application regarding the settling of the Witness List shall be made to any judge.

"7. If any action in which a date has been fixed is settled, both parties or their solicitors are required to notify the Master in Charge in writing as soon as possible and in any case not later than 24 hours after settlement.

"8. The foregoing paragraphs will apply to all the cases in the Witness List except cases in which dates for hearing have been fixed for this sittings and all such other cases as will be notified for hearing this sittings before the 19th July."

Agricultural Holdings.—Practitioners will learn without regret that the Agricultural Holdings Act, 1923, and Part III of the Agriculture Act, 1947, have been consolidated (with some miscellaneous provisions) into the Agricultural Holdings Act, 1948. Obviously we do not need to deal with this new Act here, but perhaps we may call attention to a small but important practical point in the Seventh Schedule. A mortgage of agricultural land as defined by the Agriculture Act, 1947, cannot validly contain a clause restricting the power of a mortgagor or mortgagee to make leases within the Law of Property Act, 1925, s. 99.

Planning Regulations.—The Appointed Day (July 1, 1948) under the Town and Country Planning Act, 1947, having come and gone, we are borne down under a weight of Orders and Regulations which cannot be detailed here. Nevertheless, there are certain salient features which emerge and for the rest we must warn practitioners that this many-headed Hydra has sprouted vigorously.

The nature of the "restricted use" imposed by section 12 of the Act becomes plain on analysis of the General Development Order (958/48) and the Uses Classes Order (954/48), both of which every practitioner should obtain. These Orders are not exhaustive in the sense that they indicate every possible form of "development", but they do give an indication of how narrowly the word "development" is to be construed according to official eyes. The Uses Classes Order provides that certain developments shall be *deemed* not to be developments for the purposes of the Act, which means that, while the Order is in force, the developments there mentioned do not apparently require either a planning permission or the payment of a development charge. So, an office used for one purpose may be used as an office for another purpose, or a shop of one kind for a shop of another kind, except certain types, such as a fried fish shop. But it is important in this connection that it is only the "material change" in "use" that is permitted by the Order. Anything further, for instance, in the way of structural change for the convenience of such change of use, is not covered by the Order. Thus, for example, it would probably be difficult in most cases to change a hairdresser's shop into a butcher's shop without some material change as well as the change of use. This material change might require planning permission and attract development charge.

The General Development Order deals apparently with two things. First, it deals with the rules governing planning permissions. These rules are set out in detail, but obviously practitioners will work in consultation with the local planning authority until they are familiar with them. Secondly, it provides for a number of cases in which a planning permission will not be necessary because the Order itself operates as a planning permission. This Order does *not* deal with the question of development charge and it is conceivable that there may be cases in which development charge is payable though planning permission is not necessary. Typical of the restrictions imposed by the Act is that planning permission under the Order to erect gates, fences, walls and other means of enclosure is unnecessary *provided* (i) they do not exceed seven feet, *or* (ii) afford access to or abut on the highway. Again, while there is a general permission to erect buildings within a curtilage for use with a dwelling-house *provided* (i) it does not exceed ten feet in height *or* (ii) 1,000 cubic feet in capacity, nevertheless this permission does *not* include a garage.

This last Order needs to be read in conjunction with the Development Charge Exemptions Regulations (1188/48), which exempt some developments from development charge, but, of course, they do not exempt from planning permission. For example, the erection of any fences, walls, gates, posts or other similar structures does not attract a development charge, although if it were more than seven feet high

or abutted on a highway a fence or wall would require a planning permission.

Development charge will also not be payable in respect of a material charge *within* any of the classes specified in the Uses Classes for Third Schedule Purposes Order (955/48). So, for example, if a boarding house is changed into a residential hotel, no development charge will be payable. Of course, this Order also affects other questions such as compulsory acquisition under Part V of the Act.

The Development Charge Regulations (1189/48) bring out another aspect of the matter, namely, that where the charge is payable it will constitute, at least theoretically, a hundred per cent. of the value of the planning permission. The Act clearly contemplates that this would not necessarily be the case, but for the time being the Ministry have so decided. Incentives to develop must come from other sources than increased value of the land.

There are a number of other orders or regulations more specific in scope, but it is not possible to deal with them here, several of them being concerned with mines and minerals. This particular feature of the Act is likely to prove intractible.

What is now clear, however, is that "restricted use" is to be narrowly confined, and that, in fact, the planners propose no latitude save such as they shall from time to time graciously permit. It also becomes plain that procedurally there should be little difficulty. Only in the most obvious cases will any move be taken without first ascertaining whether or not a permission is necessary. If a permission is necessary the question of development charge will be dealt with at the same time and through the same office, so that there will be little excuse for planning contraventions unless too great reliance is placed on a personal interpretation of what is permitted without express permission and without charge. The uncertain element lies in the inability of purchasers, lessees and mortgagees to know by inspection whether or not there has been a planning contravention. With this and kindred topics, however, we deal in an article on a later page.

Trustee under Disability—practice direction concerning evidence. —We have received the following practice note from the Chief Master, Chancery Division :—

"The Chancery Judges have directed that the Practice Note at p. 178 of the *Weekly Notes* for 18th August, 1945, as to evidence of the incapacity of a Trustee is no longer to be acted upon. In future there must be medical evidence showing incapacity to act as a Trustee at the date of the issue of the Originating Summons and that the incapacity is continuing at the date of swearing the Affidavit. The Affidavit should also show incapacity to execute Transfers where a Vesting Order of stocks and shares is asked for.

"The Trustee under disability shall be made a Respondent to the

Summons but need not be served unless he is sole Trustee or has a beneficial interest."

Ecclesiastical Measures.—Several Measures of the Church Assembly may be shortly noted as of general interest.

(i) The Church Commissioners Measure, 1947, has provided for the amalgamation of the functions of Queen Anne's Bounty with those of the Ecclesiastical Commissioners in a new body entitled the Church Commissioners, a body corporate having perpetual succession and a common seal (section 1), and this seal shall be authenticated by the signature of the secretary *or* a person authorised by him (section 9 (2)) This body has power to acquire land without a licence in mortmain (section 1).

All the functions and all the property of the older bodies are vested in the Church Commissioners by the operation of the Measure (section 2). Property held on trust is held on trust for the Commissioners, but none of this affects any existing trust, charge or tenancy (*ibid.*).

The rest of the Measure is concerned with the organisation, control generally being exercisable by the Board of Governors, together with an Estates and Finance Committee.

(ii) The Parsonages (Amendment) Measure, 1947 (amending the Parsonages Measure, 1938, noted Vol. 3, p. 1), authorises Queen Anne's Bounty (now the Church Commissioners) to purchase any property proposed to be sold under the Parsonages Measure, 1938, provided (a) the Bishop and Dilapidations Board are satisfied that the price is reasonable, *and* (b) no objection is made by the Parochial Church Council or the patron (section 1). This should simplify the disposal of parsonage houses which are too expensive for modern incumbents. It also authorises the postponement in whole or in part of the repayment of money advanced under the Clergy Residences Repair Act, 1776, for such periods and on such conditions as the Bounty may from time to time determine and the power may be exercised when the loan is made or at any time during its currency. Sub-section (1) of section 5 is altered by the substitution of a new paragraph (iv) relating to repayments to the incumbent and to the Bounty.

(iii) There are two other Measures not directly concerned with property, namely, the Incumbents (Discipline) Measure, 1947, and the Clergy Pensions Measure, 1948. The Discipline Measure makes a considerable inroad on the "parson's freehold". It provides power to inhibit an incumbent for a period not exceeding three years or declare the benefice vacant for "conduct unbecoming the character of a clerk in Holy Orders" *or* for "serious, persistent *or* continuous neglect of duty". These matters cannot include any questions either of doctrine, ritual or ceremonial or social or political opinions (section 2). There is otherwise no definition or attempt at definition of these "offences", and the Measure is concerned otherwise with procedure. Complaint may be made either by a person appointed by the Bishop or by the patron, or by a churchwarden or by three communicants on the electoral roll. The Bishop can in effect prevent complaints being proceeded with and can deal with the matter "summarily", as we should say in criminal cases, on the request in writing of the

incumbent. Otherwise the Bishop will refer it to a special tribunal from which an appeal lies to the Provincial Court.

The Pensions Measure is much too complicated for detailed consideration here. It is important to note that it does not apply compulsorily to clergy who have attained fifty-five on the "Appointed Day" (January 1, 1927) (section 61 (1)). The amount of the pension depends on "pensionable service" as defined by section 29, a very complicated section. There are essentially two classes of contributors and pensioners: Class A, who were ordained before the commencement of the Measure (January 1, 1948), and Class B, those ordained after. The pension rates for the clergy are the same, but the pensions for widows and dependants are calculated differently. Furthermore, Class A contributors in some circumstances get contributions returned (section 9), and this is particularly important in connection with clergy who have never drawn a pension since it goes to swell their estate (see section 9 (1) (3)). Class B contributions are in no circumstances returnable (section 21).

There is a limited power to give pensions to persons who have not made contributions or who have made them voluntarily (see section 30, Part V).

The Charitable Trusts Acts do not apply to any property vested in the Pensions Authority except where the property is either (i) applicable for special charitable purposes or (ii) forms part of one of the funds constituted by sections 42 and 43 from gifts or testamentary dispositions made to the Pensions Authority.

Courts (Emergency Powers) Act—Practice Direction.—The following Direction revoking an earlier Direction (*ante*, Vol. 11, p. 230) has been received: The Direction made in March, 1947, requiring that every Originating Summons issued in the Chancery Division claiming leave under the Courts (Emergency Powers) Act, 1943, to exercise any right or remedy in relation to or affecting premises should contain a statement whether such premises were or were not situate within an evacuation area, and if so situate, specifying the reason why the said premises were excepted from the restrictions imposed by the Defence (Evacuated Areas) Regulations is withdrawn and such statement shall no longer be required.

Indorsements on Probates.—In *The Law Society's Gazette*, p. 143 (August number) the Council recommend the following practice with regard to indorsements:—

(i) Solicitors acting for personal representatives should, immediately after an assent or conveyance, indorse a memorandum on the relative grant of representation, which memorandum should be signed and dated either by the personal representatives or by their solicitors; and

(ii) Memoranda indorsed on grants of representation relating to the property under contracts for sale should be abstracted by vendor's solicitors.

The Council in issuing this advice point out that section 36 of the Administration of Estates Act, 1925, only makes such an indorsement obligatory where a person in whose favour the assent or conveyance is made requires it. The recommendation is clearly intended to avoid difficulties on titles when no request is made, but, of course, the matter goes further. A purchaser would take a good title against an assentee or grantee whose assent or grant was not indorsed except against a purchaser (section 36 (6)), and supposing he had no actual knowledge *dehors* the probate. Our reason for making the second qualification is based on the use of the words " *sufficient* evidence ", which are not the same as conclusive evidence : *Re Duce & Boots' Cont.*, [1937] Ch. 642.

We would suggest that a solicitor acting for a beneficiary under a will or other volunteer, who does not require the memorandum to be indorsed and obtain satisfactory evidence that the indorsement has been made, may be liable in an action for damages for negligence at the suit of his client if he suffers loss thereby. This is the sort of practice point on which he is expected to exercise proper care : cf. *Fletcher* v. *Jubb*, [1920] 1 K. B. 295.

On the other hand we would also point out that these indorsements are not strictly pertinent where the grantee takes under a sale. Such a grantee is clearly protected by the sub-section and, though it is no doubt sometimes convenient to have an indorsement for the benefit of future purchasers, the purchaser himself cannot suffer from failure to make it, and in our opinion the probate should not be encumbered with indorsements of conveyances where the whole of the land comprised in a particular title is sold to one purchaser.

Agriculture Act, 1947.—The Law Society announce (*Gazette*, p. 142) that before any order applying section 86 of the Act (requiring consent in certain cases) the Society is to be consulted, and further that it is believed that there is no immediate intention to make any such order.

Section 86 applies to consents on sales where the agricultural units are split up. In our view, however, it is just as well for purchasers to take conveyances making clear what agricultural units are taken over, because it will facilitate contracts when the section is brought into operation.

We have received the following communication that may be of general interest :—

" Referring to the article on page 231 of the *Conveyancer* on ' Surviving co-owner—Conveyance to Purchaser ' and the form of conveyance given on page 379, I would like to draw your attention to the case of *Re Cook, deceased, Beck* v. *Grant*, [1948] 1 All E. R. 231. After a reference to the case of *Re Selous, Thompson* v. *Selous*, [1901] 1 Ch. 922, in which it was laid down that a person could not be trustee for himself, it was decided in *Cook's Case* that on the death of one of two joint tenants the trust for sale came to an end. Subject to *Cook's Case* being overruled by a higher authority it would appear that it is

not necessary to appoint a new trustee and would indeed be wrong as the trust had come to an end on the death of the first joint tenant.

"The question arises as to what inquiries ought to be made of the survivor of joint tenants on a sale. A search at the Land Registry in the name of the deceased joint tenant is not conclusive unless it can be shown that the property was disclosed in the affidavit for Inland Revenue, which is not practical. It may be that by means of a bank's form of mortgage the joint tenancy has been severed without the survivor having any knowledge."

We think, with respect, that our learned correspondent has overlooked the peculiar wording of section 23 of the Law of Property Act, 1925, which appears to be designed to meet this point. The section provides that for the protection of a purchaser a trust for sale, express or implied, shall be *deemed* to subsist until the land is conveyed to or by the direction of the person entitled to the proceeds of sale. This section provides one of the several legal fictions set up by this legislation. It is immaterial whether or not the trust for sale does in fact subsist. In order, however, to get the benefit of the section where there is a sole surviving joint tenant, who may, as our learned correspondent points out, have in law ceased to be a joint tenant in equity before the death of the last joint tenant, it is necessary to go through the form of appointing a new trustee to a trust for sale that may subsist only for the purposes of section 23. We think that the form given on page 379 of Volume 11, to which our correspondent refers, is correct in form since the new trustee is appointed for such of the purposes of the statutory trust for sale as are still subsisting, and by section 23 the statutory trust for sale would appear to continue to subsist for the purpose of protecting a purchaser though it may not do so for any other purpose (*Re Cook, supra*).

We are obliged to our correspondent for pointing out the conveyancing difficulty to which the decision gives rise, if our interpretation of section 23 is incorrect. Decisions such as *Re Cook* and *Re Wellsted*, [1948] 2 All E. R. 208 (noted, *post*, p. 57), made more than twenty years after the Acts coming into operation, both of which seem to run counter to the general intentions of this legislation, bring home the need for exercising care when other difficulties arise in the interpretation of this legislation, such, for example, as the protection afforded by section 110 of the Settled Land Act (see Vol. 10, p. 135).

CORRIGENDUM

Vol. 12, p. 312, line 11.

For the sentence beginning "Where a married woman" substitute the sentence "Where a married woman is living with her husband her income will be treated as his and charged to tax in his name".

Vol. 12, p. 380, line 2 (Form 25, Clause 9).

For "one calendar month's notice" read "two calendar months' notice".

VOLUNTARY ACQUISITION OF LAND BY LOCAL AUTHORITIES: PAYMENT OF VENDOR'S SOLICITORS' COSTS

By H. Woodhouse, M.A., Solicitor

A. The General Rule

A recent article in *The Law Society's Gazette* (December, 1947, p. 240) (*a*) draws the attention of practitioners to the fact that where local authorities acquire land under the Lands Clauses Consolidation Act, 1845, whether compulsorily or by agreement, the acquiring authority is under an obligation to pay the vendor's solicitors' costs for the conveyance and such costs are calculated according to Schedule II of the General Order to the Solicitors' Remuneration Act, 1881, and not according to the ordinary scale specified in Schedule I. In practice, no doubt, it is usual for the contract with the local authority to contain some provision dealing with liability for costs and the inclusion of such provision is undoubtedly wise, but even if the contract is silent upon the matter, the local authority will none the less be liable.

This obligation to pay the vendor's solicitors' costs is imposed by section 82 of the Lands Clauses Consolidation Act, 1845, which provides as follows :—

> "The costs of all such conveyances shall be borne by the promotors of the undertaking; and such costs shall include all charges and expenses, incurred on the part as well of the seller as of the purchaser, of all conveyances and assurances of any such lands, and of any outstanding terms or interest therein, and of deducing, evidencing, and verifying the title to such lands, terms, or interests, and of making out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses incident to the investigation, deduction, and verification of such title."

Rule 11 of the rules applicable to Schedule I to the Solicitors' Remuneration Act General Order, 1882, provides that in the case of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, the Scale in Schedule I shall not apply. Such costs are, therefore, to be calculated on an item basis under Schedule II and the opinion is expressed in the above-mentioned article in *The Law Society's Gazette* that a local authority, in the case of such an acquisition, is not entitled to pay or even to agree to pay the vendor's solicitors' costs calculated on the scale basis under Schedule I.

These provisions were considered by the Court of Appeal in *Re Burdekin*, [1895] 2 Ch. 136. In that case a local authority had acquired land by agreement for the purpose of the construction of

---

(*a*) A further note in *The Law Society's Gazette* (March, 1948, p. 55) deals with the question of liability for vendor's solicitors' costs when property vests in the acquiring authority by virtue of a "purchase order providing for expedited completion" and without the necessity for the execution of any conveyance.

sewage works, the powers of acquisition being conferred on the local authority by the Public Health Act, 1875. The contract between the vendor and the local authority provided that all costs and expenses of the vendor of and incidental to the sale should be paid by the local authority. The vendor's solicitors made out their bill of costs on a Schedule II basis but on taxation the Schedule I scale charge was allowed by the Master on the ground that the acquisition was voluntary. On a summons to review the costs the Court held that the sale was a sale under the Lands Clauses Consolidation Act, 1845, even though it was by agreement and not compulsory, as the local authority had no power to purchase the land except in exercise of the powers conferred on it by the Public Health Act, 1875, and that Act expressly incorporated the Lands Clauses Consolidation Act, 1845. Hence the bill was rightly made out under Schedule II. This decision was affirmed by the Court of Appeal.

The sections of the Public Health Act, 1875, which were considered in *Re Burdekin* were sections 175 and 176. Section 175 authorised a local authority to purchase land *subject to the provisions of that Act* and section 176 (*b*) provided that with respect to the purchase of lands by a local authority for the purposes of that Act the Lands Clauses Acts should (with certain exceptions not here relevant) be incorporated with that Act. The above-quoted provision of section 176 must be taken to apply the Lands Clauses Acts to voluntary purchases by local authorities, as another part of that section dealt with the procedure to be adopted when a local authority sought to acquire land compulsorily under the Lands Clauses Acts. The effect, therefore, is that the Lands Clauses Acts were incorporated with the Public Health Act, 1875, that a purchase by a local authority for the purposes of the 1875 Act must be a purchase under that Act (as the local authority had no power to acquire land for those purposes apart from that Act) and hence such a purchase, though voluntary, was a purchase under the Lands Clauses Consolidation Act, 1845, with the result that the local authority was under a statutory obligation to pay the vendor's solicitors' costs. Such costs were consequently to be calculated under Schedule II.

The Solicitors Remuneration (Registered Land) Order contains no provision parallel to rule 11 in the 1882 Order (discussed above). Accordingly on sales of registered land under the Lands Clauses Acts the scale fee is chargeable.

As mentioned above, the article in *The Law Society's Gazette* (December, 1947), suggests that where rule 11 in the 1882 Order applies it is not competent for the local authority to pay or agree to pay Schedule I costs, and it is further stated in that article that should the local authority pay or agree to pay Schedule I costs there may be a risk of a surcharge. It is thought that this risk would only arise where the Schedule I costs would be higher than the Schedule II costs. Very often the boot is on the other foot, as on small acquisitions the Schedule I costs are normally lower than Schedule II costs.

(*b*) Section 176 of the Public Health Act, 1875, was repealed by the Local Government Act, 1933.

The right to be paid costs under section 82 of the Lands Clauses Consolidation Act, 1845, is *the vendor's right as against the purchasing authority*, not the solicitors' right as against that authority, and in view of rule 11 of the rules applicable to Schedule I, the vendor's solicitor is *entitled to charge his client* Schedule II costs in all cases to which that rule applies. There seems no reason why the vendor should not in his contract agree to accept from the local authority a *smaller* sum in respect of costs than that to which he would have been entitled by the unrestricted operation of section 82 and rule 11. This is what he would generally be doing, if on a small acquisition the contract provided that the local authority should pay Schedule I costs. In theory, of course, the vendor's solicitor would still, in such a case, be able to claim the Schedule II costs from his client under rule 11, for the solicitor is not a party to the contract between the vendor and the local authority but it is clear that in practice the solicitor could not do so unless he had explained the position fully to his client the vendor before the contract was signed and had pointed out to the client that he would be required to pay the difference. Consequently, therefore, a provision in a contract requiring the local authority to pay Schedule I costs seems to be legally unobjectionable in cases where such costs are smaller than Schedule II costs, though in practice it will mean that the vendor's solicitor will be sacrificing some of his costs.

If, however, the acquisition is a large one then any express agreement by the local authority to pay Schedule I costs would amount to the assumption of a heavier liability by the local authority than is required by the statute and such an agreement might be *ultra vires* and lead to a surcharge.

An express agreement by the local authority to pay the vendor's solicitors' costs *simpliciter* will, in view of rule 11 and *Re Burdekin* (*supra*), operate as an agreement to pay Schedule II costs.

The foregoing points may be summed up as follows :—

(1) Where a local authority acquires land by agreement under the Lands Clauses Consolidation Act, 1845, or under an Act which expressly or impliedly incorporates the 1845 Act, then, if the contract is silent as to costs, the local authority must pay the vendor's solicitors' costs.

(2) Where the contract is silent as to costs or where (as in *Re Burdekin*) it expressly provides that the local authority shall pay the vendor's solicitors' costs, such costs must be calculated on an item basis under Schedule II of the Solicitors Remuneration Order in the case of unregistered land, though on sales of registered land the scale fee can be charged.

(3) Where in the case of unregistered land the contract provided that the vendor's solicitors' costs shall be paid by the local authority, it should, to avoid disputes later, expressly provide that Schedule II shall apply.

(4) As the right under section 82 of the Lands Clauses Consolidation Act, 1845, is the vendor's right, he can presumably waive it and agree expressly to pay his own solicitors' costs in whole or in part.

B. Incorporation of the Lands Clauses Acts

It will be seen from the foregoing remarks that the application of this rule which obliges the local authority to pay the vendor's solicitors' costs, depends upon whether the acquisition is taking place under the Lands Clauses Consolidation Act, 1845, or under some Act incorporating that Act.

Normally the Act which empowers the Local authority to acquire land expressly incorporates the 1845 Act, but such express incorporation does not appear to be necessary in view of section 1 of the 1845 Act itself which provides as follows :—

> " This Act shall apply to every undertaking authorised by any Act which shall hereafter be passed, and which shall authorise the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act."

Section 2 of the 1845 Act defines " undertaking " as meaning " the works or undertaking of whatever nature which shall by the Special Act be authorised to be executed "; " the Special Act " as meaning " any Act which shall be hereafter passed which shall authorise the taking of lands for the undertaking to which the same relates " and " the promoters of the undertaking " as meaning " the parties, whether company, undertakers, commissioners, trustees, corporations or private persons, by the Special Act empowered to execute such works or undertaking ". In view of these provisions it seems clear that the Lands Clauses Acts must be taken to be incorporated in the Special Act whether specially mentioned therein or not, unless their provisions are inconsistent with the general scope of the Special Act (*Weld* v. *S. W. Ry.* (1863) 32 Beav. 340). Thus in *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co., Ltd.*, [1919] A. C. 744 they were held to be applicable to the Liquor Control Board established during the 1914–18 war, as such Board was authorised by the Defence of the Realm Regulations to acquire land, although the empowering regulations made no mention of the Lands Clauses Acts.

Generally speaking, however, there is no need to rely on section 1 of the 1845 Act to establish that that Act is incorporated, as the Special Act provides for an express incorporation. In the remainder of this article it is proposed to examine the more important Acts under which local authorities may acquire land by agreement, with a view to ascertaining how far the Lands Clauses Acts are incorporated.

C. Acquisitions Under Part VII of the Local Government Act, 1933 and Part V of the London Government Act, 1939

These two Acts contain the general code under which local authorities may acquire land by agreement. The 1933 Act applies to local authorities outside London and the 1939 Act applies to London local authorities.

As to local authorities outside London, section 157 of the Local Government Act, 1933, provides that a local authority (other than a parish council) may, for the purpose of any of its functions under *that* or *any other public general Act*, by agreement acquire land. Section 167 contains a similar provision for parish councils.

Section 176 of the 1933 Act provides that where under this Part

of the Act (*i.e.*, Part VII, which includes sections 156–179) a local authority is authorised to acquire land by agreement, the Lands Clauses Acts, except the provisions relating to the acquisition of land otherwise than by agreement and the provisions relating to access to the special Act, and except sections 127–133 of the Lands Clauses Consolidation Act, 1845, shall be incorporated with this Act.

As to London local authorities, parallel provisions are contained in Part V (sections 97 and 99) of the London Government Act, 1939.

Consequently, therefore, when a local authority is acquiring land for the purpose of any of its functions under any public general Act, the position is quite clear: *viz.*, that the Lands Clauses Acts are incorporated and the local authority must pay the vendor's solicitors' costs as required by section 82 of the Lands Clauses Consolidation Act, 1845.

The general code contained in Part VII of the 1933 Act and Part V of the 1939 Act is not all embracing, as acquisitions under certain statutes are excepted. Section 179 (g) of the 1933 Act provides that Part VII of that Act shall not affect any provisions relating to the acquisition, appropriation or disposal of land by a local authority contained in any of the enactments set out in the Seventh Schedule to that Act. The parallel provision in the 1939 Act is contained in section 114 (2).

The excepted enactments are considered below.

D. Acquisitions Excepted from Part VII of the Local Government Act, 1933 and Part V of the London Government Act, 1939

(Other than Acquisitions under the Housing Act, 1936)

The excepted enactments are listed in the Seventh Schedule to the 1933 Act and the Fifth Schedule to the 1939 Act. Except where otherwise stated the enactments discussed below are listed in both of the above Schedules. The Housing Act, 1936 is considered separately.

Several of the enactments listed in the above-mentioned Schedules have now been repealed in whole or in part. These repeals reduce considerably the excepted cases which fall outside the general code discussed in C above. For the sake of completeness and in order to enable the reader to trace what has happened to these enactments which are listed in the above-mentioned Schedules to the 1933 and 1939 Acts but which are not discussed in the body of this article, a footnote upon the repealed enactments is set out below (*c*).

(*c*) Enactments which are listed in the Seventh Schedule to the Local Government Act, 1933, and the Fifth Schedule to the London Government Act, 1939, but which have now been repealed so far as relates to the subject-matter of this article:—

(a) *The Lunacy and Mental Treatment Acts, 1890 to 1930.* Ss. 254 and 260 of the Lunacy Act, 1890, which dealt with the power to acquire land and the incorporation of the Lands Clauses Acts are repealed as from the appointed day (July 5, 1948) by the National Health Service Act, 1946.

(b) *The Education Acts, 1921 to 1937.* The references to these Acts in the Seventh Schedule to the Local Government Act, 1933, and in the Fifth Schedule to the London Government Act, 1939, were repealed by the Ninth Schedule to the Education Act, 1944. Acquisitions for the purpose of the Education Acts now fall within the general code discussed in C above.

(c) *The Town and Country Planning Act, 1932.* This Act is repealed as from the appointed day (July 1, 1948) by the Town and Country Planning Act, 1947 (Ninth Schedule, Part II). The references to the 1932 Act in the Seventh Schedule to the Local Government Act, 1933, and in the Fifth Schedule to the London Government

1. THE TECHNICAL AND INDUSTRIAL INSTITUTIONS ACT, 1892

Section 5 of this Act empowers the "governing body" (which may be a local authority) to acquire land by agreement for the purposes of the Act. Section 4 expressly incorporates the Lands Clauses Consolidation Act, 1845 (except the provisions of these Acts relating to the purchase and taking of lands otherwise than by agreement and certain other provisions not relevant to the present discussion).

2. THE MILITARY LANDS ACTS, 1892 TO 1903

Section 1 of the 1892 Act authorises the acquisition of land for the purposes there specified and section 2 expressly incorporates the Lands Clauses Acts (except certain provisions not here relevant).

3. THE PUBLIC LIBRARIES ACTS, 1892 TO 1919

Section 11 of the 1892 Act authorises the acquisition of land and section 12 expressly incorporates the Lands Clauses Acts, except the provisions relating to the purchase of land otherwise than by agreement.

4. THE LIGHT RAILWAYS ACTS, 1896 AND 1912

(*Not Listed in Fifth Schedule to the London Government Act, 1939*)

Section 11 of the 1896 Act enables the Lands Clauses Acts to be incorporated in any order made under that Act. Before a light railway can be established under the Light Railways Acts (see sections 2 and 3) an order has to be obtained; hence the incorporation of the Lands Clauses Acts is appropriately effected in the order and not in the Act itself. It should be noted that the Light Railways Acts are not affected by the Transport Act, 1947. Owing to the development of road transport, applications for orders under the Light Railways Acts are now very infrequent.

5. THE ALLOTMENTS ACTS, 1908 TO 1931 AND THE SMALL HOLDINGS AND ALLOTMENTS ACTS 1908 TO 1931

Section 25 of the Small Holdings and Allotments Act, 1908, authorises the local authorities there specified to acquire land by agreement for the purposes of that Act. Section 38 provides that for the purpose of the purchase of land by agreement under that Act, the Lands Clauses Acts shall be incorporated with that Act, except the provisions with respect to the purchase and taking of land otherwise than by agreement.

Section 17 (1) of the Small Holdings and Allotments Act, 1926 enacts that the provisions of the Lands Clauses Acts incorporated

---

Act, 1939, are also repealed by the 1947 Act (Ninth Schedule, Part II). Acquisitions for the purpose of the Town and Country Planning Act, 1947, will now fall within the general code (and see also s. 40 (1) and (2) of the 1947 Act).

(d) *The Electricity (Supply) Acts, 1882 to 1936.* The electricity undertakings of local authorities vested in the appropriate Electricity Boards on April 1, 1948, under the Electricity Acts, 1947. The powers of acquiring land for the purposes of the Electricity (Supply) Acts are now vested in these Boards and not in local authorities—see Fourth Schedule, Part I, to the Electricity Act, 1947.

with the 1908 Act by section 38 of that Act for the purpose of the purchase of land by agreement under that Act shall not include section 82 of the Lands Clauses Consolidation Act, 1845, relating to the costs of conveyances. The effect of this amendment is that section 82 of the Lands Clauses Consolidation Act, 1845 is expressly excluded and that on voluntary acquisitions under the Small Holdings and Allotments Acts each party pays its own costs (unless otherwise agreed).

The Small Holdings and Allotments Acts are repealed as respects small holdings by section 67 (2) of the Agriculture Act, 1947, but not as respects allotments. A small holding is a holding used or intended to be used for agriculture, being either a holding of which the area exceeds one acre and does not exceed fifty acres or a holding of which the area exceeds fifty acres but does not exceed seventy-five acres and the annual full fair rent does not exceed £150 (see section 66 (1) of the Agriculture Act, 1947). An allotment means *either* an "allotment garden" (that is an allotment not exceeding forty poles in extent which is wholly or mainly cultivated by the occupier for the production of vegetable or fruit crops for consumption by himself or his family—section 22 of the Allotments Act, 1922), *or* any parcel of land not more than five acres in extent cultivated or intended to be cultivated as a garden or farm, or partly as a garden and partly as a farm—section 1 of the Allotments Act, 1925.

6. The Development and Road Improvement Funds Act, 1909

Section 11 (3) empowers highway authorities to acquire land for the purpose of the construction or improvement of highways and section 11 (4) provides that for the purpose of the purchase of land by agreement under this Part of the Act by a highway authority, the Lands Clauses Acts shall be incorporated with this Part of the Act (except the provisions of those Acts with respect to the purchase of land otherwise than by agreement).

7. The Air Navigation Acts, 1920 and 1936

Section 8 (1) of the 1920 Act empowers local authorities to acquire land by agreement for the construction of aerodromes and section 8 (5) provides that for the purpose of the purchase of land under this section by a local authority the Lands Clauses Acts shall be incorporated with this Act (except the provisions of those Acts with respect to the purchase and taking of land otherwise than by agreement).

8. The Metropolis Management Acts, 1855 to 1893 (London Only)

Section 150 of the 1855 Act authorised the Metropolitan Board of Works to purchase land for the purposes there specified, and section 151 expressly incorporates the Lands Clauses Consolidation Act, 1845 (except certain provisions not here relevant). The functions of the Metropolitan Board of Works are now vested in the London County Council.

9. Parts II and VII of the Public Health (London) Act, 1936 (London Only)

Part II of the Act deals with sewerage and drainage. Section 69 (1) authorises the acquisition of land for these purposes and section 69 (2) expressly incorporates the Lands Clauses Acts (except certain portions not material). Part VII deals with public baths and washhouses. Section 168 authorises the acquisition of land and expressly incorporates the Lands Clauses Acts.

10. The Air-Raid Precautions Act, 1937 (London Only)

Section 5 of this Act provides for the compulsory acquisition of land by a local authority but there is no express provision in the Act dealing with voluntary acquisitions. The obligation to prepare schemes under this Act is suspended as from December 10, 1945 by the Civil Defence (Suspension of Powers) Act, 1945.

11. Any Local Act

The general code does not apply to acquisitions under local Acts. The provisions of each Act must be considered in each particular case.

E. Acquisitions Under the Housing Act, 1936

The Housing Acts, 1925 and 1930 (which were repealed by the Housing Act, 1936) are listed in the Seventh Schedule to the Local Government Act, 1933. As the 1936 Act is a consolidating Act, it would appear that in view of section 38 (1) of the Interpretation Act, 1888, the reference to the 1925 and 1930 Acts in the Seventh Schedule to the Local Government Act, 1933, should now be construed as a reference to the 1936 Act.

The Fifth Schedule to the London Government Act, 1939, expressly lists the Housing Act, 1936.

It is, therefore, clear that the general code relating to voluntary acquisitions by local authorities under public general Acts does not apply to acquisitions under the Housing Act, 1936.

There is no express incorporation of the Lands Clauses Acts in the Housing Act, 1936, as in the several Acts listed in D above. Where, however, a compulsory purchase order is made, the Lands Clauses Acts are expressly incorporated *in that order* (except sections 127 to 132 of the Lands Clauses Consolidation Act, 1845)—see the First Schedule to the 1936 Act; but the 1936 Act does not state expressly that the Lands Clauses Consolidation Act is incorporated in relation to voluntary acquisitions. The position in connection with voluntary acquisitions under the 1936 Act is by no means clear, as appears from the following observations which are set out as arguments for and against the incorporation in the 1936 Act of the Lands Clauses Acts :—

(1) *Arguments in favour of incorporation.*

(a) The carrying out by a local authority of its functions under the 1936 Act may be said to constitute the "execution of an undertaking" within section 1 of the Lands Clauses

Consolidation Act, 1845, and hence that section operates to incorporate the Lands Clauses Consolidation Act, 1845, in the Housing Act, 1936. Such an incorporation is perfectly possible (see B above) unless it can be shown that the provisions of the Housing Act, 1936, are inconsistent with such incorporation.

(b) Incidental references to the Lands Clauses Acts in the Housing Act, 1936, appear to presume such an incorporation as is suggested in (a). The following incidental references are noted:—

(i) *Section* 145 (1) *and* (2). Section 145 (1) only applies to compulsory purchases and as stated above the Lands Clauses Acts are expressly incorporated in compulsory purchase orders. Section 145 (2) applies to voluntary acquisitions and gives the acquiring authority certain powers of entry which it would have possessed if the acquisition had been compulsory. The incidental reference to the Lands Clauses Consolidation Act, 1845, arises in describing these powers of entry. It would not seem that either of these references is conclusive in favour of the view that the 1845 Act is impliedly incorporated in connection with voluntary purchases.

(ii) *Section* 147. This excludes the application of section 133 of the 1845 Act. As it is not easy to see how section 133 can apply to voluntary acquisitions in any event, the reference in section 147 does not seem to be of much significance for the present argument.

(iii) *Section* 79 (5). This sub-section excludes sections 128 to 132 of the Lands Clauses Consolidation Act, 1845 (which relate to the sale of superfluous lands). As these sections are expressly excluded from the incorporation of the Lands Clauses Acts in compulsory purchase orders (see First Schedule to the 1936 Act), section 79 (5) would be otiose unless these sections of the 1845 Act would otherwise apply to voluntary acquisitions. On the other hand, section 79 only refers to acquisitions under Part V of the 1936 Act and it is not easy to see why sections 128 to 132 of the Lands Clauses Consolidation Act, 1845, should be expressly excluded in the case of such acquisitions but not in the case of acquisitions under other Parts of the Act. It must, however, be admitted that it is difficult to understand section 79 (5) except on the assumption that the Lands Clauses Acts apply to and are incorporated in the 1936 Act as a whole, and in relation to voluntary as well as compulsory acquisitions.

(2) *Arguments against incorporation.*

(a) The Lands Clauses Acts are incorporated in the compulsory purchase orders and thus apply to compulsory acquisitions. On the principle "*expressum facit tacitum cessare*", it might be argued that the express incorporation of the Lands Clauses Acts for purposes of compulsory acquisition excludes the implied incorporation by virtue of section 1 of the 1845 Act for all acquisitions (both compulsory and voluntary).

(b) The express incorporation of the Lands Clauses Acts in compulsory purchase orders is not a complete incorporation, as sections 127–132 of the 1845 Act are expressly excluded. These excluded sections relate to the disposal of superfluous lands. Any incorporation of the Lands Clauses Acts by virtue of section 1 of the 1845 Act would *prima facie* be an incorporation of the entire Acts (*R.* v. *Mayor of London* (1867), L. R. 2 Q. B. 292), with the result that the superfluous land provisions of the 1845 Act would apply to voluntary acquisitions but not to compulsory acquisitions, which hardly seems reasonable. It is difficult to suppose that a local authority, desirous of selling land it had acquired under the Housing Act, 1936, should have to comply with the provisions as to the former owner's right of pre-emption contained in sections 128–131 of the 1845 Act, when the initial acquisition was voluntary but not when it was compulsory. This difficulty may, however, not prove serious in practice, for where acquisitions take place under Part II of the 1936 Act (provisions for securing the repair, maintenance and sanitary conditions of houses) (see section 16) it is not easy to see the relevance of the superfluous land provisions of the 1845 Act; where acquisitions take place under Part III (Clearance and Redevelopment) (see sections 27, 29, 36 and 38), sections 30 and 36 authorise the acquiring authority to sell or let the land to such persons and upon conditions as it thinks fit, and these provisions would presumably override the superfluous land sections of the 1845 Act; and where acquisitions take place under Part V (Provision of Housing Accommodation for the Working Classes), the superfluous land sections of the 1845 Act are expressly excluded (see section 79 (5) discussed in (1) (b) (iii) above).

No definite conclusion can be drawn from the foregoing arguments but the opinion is expressed here that the balance of the argument seems to favour the view that the Lands Clauses Acts are incorporated in the 1936 Act by virtue of section 1 of the Lands Clauses Consolidation Act, 1845.

F. Summary

The position may, therefore, be summed up as follows :—

(1) Where a local authority acquires land by agreement in order to enable it to discharge its functions under *any public*

general Act (except as stated below), then either by virtue of section 176 of the Local Government Act, 1933 (or section 99 of the London Government Act, 1939) or by virtue of the detailed provisions discussed in D above, the Lands Clauses Consolidation Act, 1845 (and in particular section 82 thereof) is incorporated with the Act which empowers the acquisition. Consequently, such acquisition is an acquisition under the Lands Clauses Consolidation Act, 1845, with the result that the local authority must pay the vendor's solicitors' costs and that such costs must be calculated on Schedule II basis.

(2) Where a local authority acquires land by agreement for the purposes of the Housing Act, 1936, the position is probably as in (1) above, but this is not certain.

(3) Where the local authority acquires land by agreement for the purposes of allotments under the Allotments Acts, 1908 to 1931, although the Lands Clauses Acts are incorporated for the purpose of such acquisitions, yet section 82 of the 1845 Act is expressly excluded, with the result that each party bears his own costs (unless the contrary is specifically agreed) and such costs can be calculated on the Schedule I basis.

(4) Where a local authority acquires land by agreement for the purposes of any local Act, no general rule can be laid down. Each Act must be considered by itself but at the same time the provisions of section 1 of the Lands Clauses Consolidation Act, 1845, should be borne in mind.

G. Conclusion

The following conclusions appear to be justified in all but the most exceptional cases :—

(1) Where the contract with the local authority is silent as to costs, the local authority is required by section 82 of the 1845 Act to pay the vendor's solicitors' costs.

(2) Where the contract is silent as to costs *or* expressly obliges the local authority to pay the vendor's solicitors' costs, then—

(a) in the case of sales of unregistered land, the local authority can only be required to pay costs calculated on an item basis under Schedule II of the Solicitors' Remuneration Order, 1882, but

(b) in the case of sales of registered land, the scale fee prescribed by the Solicitors' Remuneration (Registered Land) Order is properly payable.

(3) It is probably *ultra vires* for a local authority expressly to agree to pay Schedule I costs on sales of unregistered land, except, perhaps, where these would be lower than the Schedule II costs (a point which can hardly be resolved until after the contract has been exchanged).

(4) There does not appear to be anything to prevent the vendor from waiving his rights under section 82 of the 1845 Act and expressly agreeing to pay all or any part of his own

costs; and if he agrees to accept Schedule I costs and these amount to less than Schedule II costs, he will presumably be bound by his contract.

It is undoubtedly wise to include in the contract with the local authority a clause expressly dealing with liability for costs, as in practice local authorities are sometimes reluctant to pay the vendor's solicitors' costs on a voluntary acquisition unless the contract expressly obliges the authority to do so, although (as shown above) such authorities are generally liable to pay such costs even if the contract is silent.

HYBRID POWERS

By J. G. FLEMING, M.A., Barrister-at-Law

The division of powers of appointment into general and special is a well-recognised feature of property law. According to Farwell's definition, "general powers are such as the donee can exercise in favour of such person or persons as he pleases, including himself. Limited powers, which are sometimes called special powers, are such as the donee can exercise only in favour of certain specified persons or classes" (*a*). Although it has frequently been assumed that this division into the two above-mentioned categories is exclusive, as for example by the draftsman of the Legacy Duty Act, 1796, and the Finance Act, 1894 (*b*), certain powers displaying features which render it a matter of difficulty to fit them into the structure of this dichotomy, have occasionally been created. These raise the question whether they are to be construed individually so as to fall within either of the established classes or whether the existence of a third class of powers as such with special rules appertaining thereto ought now to be formally recognised. In the submission of the present writer, two reasons suggest a distinct preference for the former alternative: In the first place, it is conceived that the various forms which such powers may assume prevent them from constituting a homogeneous class, and secondly, as a consequence thereof their characterisation may be conditional upon varying criteria depending on the object of such classification. The existence of a third class of powers has indeed been indorsed by judicial reference (*c*), but it is felt that, while this terminology may be excusable on grounds of simplicity and convenience of expression, it should be avoided, since it may lead to the erroneous conclusion that identical rules are applicable to all the variegated powers of that "class" for any of the purposes for which the exact nature of powers of appointment needs to be ascertained.

It is proposed to test the preceding submission by reference to the following types of powers which have in fact been judicially

(*a*) *Farwell on Powers*, 1916, 3rd ed., p. 8.
(*b*) *Vide infra*.
(*c*) *E.g.*, by Clauson, J., as he then was, in *Re Park*, [1932] 1 Ch. 580, 584, and Vaisey, J., in *Re Jones*, [1945] Ch. 105.

noted, although it is not suggested that this enumeration comprehends all the varieties which the ingenuity of draftsmen may present for future scrutiny :

(1) A power to appoint to any person or persons other than the donee, as in *Re Park*, [1932] 1 Ch. 580.

(2) A power to appoint to any person or persons living at the death of the appointor, as in *Re Jones*, [1945] Ch. 105.

(3) A power to appoint to any person or persons, not being the present husband of the donee or any friend or relative of his, as in *Re Byron's Settlement*, [1891] 3 Ch. 474.

(4) A power to appoint to a designated class of which the donee is himself a member, as in *Re Penrose*, [1933] Ch. 793.

(5) A power to appoint to any person or persons with the consent of a third party, as in *Re Phillips*, [1931] 1 Ch. 347 and in *Re Watts*, [1931] 2 Ch. 302.

The legal validity of the above-mentioned powers is no longer a matter of doubt. In *Re Park* (*supra*) an unsuccessful attempt was made to advance the ingenious contention that the law refused to contemplate the creation of powers other than general which are equivalent to a transfer of absolute property or special powers to appoint to a strictly defined class of objects only. Clauson, J., pointed out that the customary two-fold division was not exhaustive, and, adopting a passage from Jarman (*d*), concluded that there was " a third class where the donee can appoint to anyone with certain exceptions, *e.g.*, an exception, as in the case before me, of himself, or an exception of named persons or classes of persons " (*dd*). Although, as already stated, the inclusion of these two examples into one category is to be deprecated, the decision furnished a clear pronouncement of the validity of such dispositions. *Re Jones* (*supra*) established the further point that, for this purpose, no distinction could be legitimately drawn between cases like *Re Park* and *Re Byron's Settlement* (*supra*) where the power was general but subject to certain exclusion and one where the class is defined affirmatively, though being almost unlimited in extent. The power in that case was, therefore, susceptible to the construction of being general with the exclusion of all persons not in existence at the donee's death.

Some of the above-mentioned powers have been subjected to judicial construction for certain purposes, such as their relation to the rule against perpetuities or the availability of the fund subject thereto as assets for the satisfaction of the creditors of the appointor. These decisions, however, have not been sufficiently numerous to supply an authoritative ruling either for every type of power within the so-called third class or for all the various purposes with reference to which classification becomes imperative. Nonetheless, it is conceived that they constitute a guide upon which a tentative solution of some of the outstanding problems may be predicated. Although the temptation is perhaps hard to resist to employ a decision relating to one type of power for a specific purpose as a precedent for the construction of a different type for the same or of the same type for a different purpose, these attempts have almost invariably been

(*d*) 7th ed., Vol. 2, p. 763.
(*dd*) [1932] 1 Ch. 580, 584.

visited with failure because they assumed the existence of an analogy where, it is submitted, distinct considerations are usually applicable.

The principal occasions which give rise to the necessity for classification, will now be examined in order to elicit the underlying object which led to the creation of the distinction between general and special powers in relation thereto, since it is conceived that, upon the basis of such analysis, the projected construction of the various forms of the " third class " of powers will be facilitated.

(1) Administration of Assets

Section 32 (1) of the A. E. A., 1925, provides that " the real and personal property of which a deceased person in pursuance of any general power . . . disposes by his will, are assets for the payments of his debts ", and by section 34 (3) and Part II of the First Schedule, section 7 to the same Act " property appointed by will under a general power " is the ultimate fund available for the payment of the testator's liabilities. This right of creditors to intercept the assets *in transitu* is based on the plausible premise that it is the donee's equitable duty to appoint to himself and not to a stranger, so that his debts can be satisfied; though it may be parenthetically observed that it is no doubt anomalous to deny the right if no appointment has been made, *i.e.*, that the creditors' equity is effective only against the appointees, but not against the persons entitled in default of appointment. That the Court of Equity was astute to resist any infringement of this principle of administration and to attribute a wide scope to its operation was underlined by the decision in *Lord Townshend* v. *Windham* (1750), 2 Ves. Sen. 1 where it was held that an appointment by *deed*, to be effective from death, did not prevent the fund from constituting equitable assets for this purpose. Lord Hardwicke stated the rule to be that " if it is a power to appoint a sum among other persons who are at all described by the power, so that it is not absolutely in his power to do it *for himself*, there is no pretence that his creditors could have the benefit of it ", thereby implying that, conversely, if the power, though not absolute, allows the donee to exercise it in his own favour, the fund is liable for his debts.

The precise point was decided in that sense in the Irish case of *Edie* v. *Babington* (1854) 3 Ir. Ch. 568 where a fund had been bequeathed to the separate use of A for life remainder as she should dispose by her will provided the appointment was not in favour of B, and A had exercised the power for the benefit of a stranger. The Master of the Rolls, in holding that the property represented assets for the payment of her debts, was assisted by the previous English decision in *Platt* v. *Routh* (*e*) on the construction of a similar power for the purpose of the Legacy Act, 1796 (*f*) which expressly distinguished between general and special powers of appointment. In that case Lord Abinger, after pointing out that the power in question was neither special, because there was no specific description of its objects, nor absolute or general in accordance with the customary definition on account of the exclusion of certain individuals and their families, proceeded to suggest the following solution : " The question

(*e*) (1940), 6 M. & W. 756, aff. *sub nom. Drake* v. *Att.-Gen.* (1843), 10 Cl. & F. 25.
(*f*) S. 18 of 36 Geo. 3, c. 52.

in such cases is, not whether there are persons to whom the fund could not have been given, but whether the party executing the power might not have executed it for his own benefit, *i.e.*, in payment of his own debts; and where that is the case, all appointees are held as volunteers, and as being in no better position than ordinary legatees, taking by the bounty of the appointor and subject to his debts" (*g*). The same test was held applicable to the characterisation of powers in relation to the statute in question with the result that the instant power was deemed to be general and legacy duty payable as if the donee had bequeathed an ordinary legacy of property belonging to herself absolutely.

It would seem to follow that a *Re Penrose* power to appoint to a specified class of objects in which the donee is included must be construed as general in this connection, since it is within his capacity to reduce the fund to his own property, whereas by contrast a *Re Park* power would be special, because it negatives the donee's right to appoint in his own favour. *Prima facie*, the last solution appears to be equally applicable to a power to appoint to anyone living at the appointor's death, as in *Re Jones* (*supra*), but this may ultimately depend upon a further point of construction according to whether the donee can, within the terms of the power, appoint to his personal representative or successor for the benefit of his estate. This suggestion is based on the consideration that the criterion of availability of a fund for the satisfaction of liabilities is not that the donee could have appointed the property *in his own lifetime to himself* since it is clearly established that a fund subject to a power exercisable only by will is within the equitable principle (*h*).

The remaining example which, for the sake of brevity, may be described as the "consent" power will be examined in a succeeding section.

(2) Finance Act, 1894

This Act imposed estate duty on all real and personal property which passes on the death of the deceased. Such property is deemed to include funds of which the deceased at the time of his death was competent to dispose (section 2 (1) (a)). The definition section additionally enacts that "a person shall be deemed competent to dispose of property if he had . . . such general power as would, if he were *sui juris*, enable him to dispose of the property; . . . and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both . . ." (section 22 (2) (a)). It is clear that the phrase "as he thinks fit" refers to the disposal of the property, not the mode of disposal, so that a power which must be exercised in a certain manner, as, *e.g.*, by special reference to the power (*i*) would none the less be construed as general (*k*).

(*g*) At p. 789.
(*h*) *Edie* v. *Babington* (*supra*), *Beyfus* v. *Lawley*, [1903] A. C. 411. The weight of opinion is to the contrary in relation to the Perpetuity Rule, for which see below.
(*i*) Cf. *Phillips* v. *Cayley*, *infra*.
(*k*) Hanson's *Death Duties*, [1946], 9th ed., p. 67.

That liability to estate duty is even more comprehensive than the corresponding liability to satisfaction of debts under the A. E. A., 1925, is shown by the fact that section 22 expressly declares it to be immaterial that such "disposition" has *not* in fact taken place or that, by reason of an existing incapacity, the deceased was not legally able to dispose of the property. The provisions, however, do appear to be co-extensive in including general powers exercisable or exercised by deed, provided the fund passes on the death of the deceased and not before. As Lord Parker remarked in *Att.-Gen.* v. *Milne*, [1914] A. C. 765, 779, there must be "some actual change in the title or possession of the property as a whole which takes place on death. For the purpose of (section 1 of the Finance Act) it is absolutely immaterial to whom, and by virtue of what disposition, the property passes", and, as already demonstrated, the same principle was applied in *Townshend* v. *Windham* (*supra*) in relation to the equitable rule of administration.

It will have been observed that the Finance Act stipulates the test of the deceased's *competence* to *dispose* of the fund at the time of his death; whereas for the purpose of liability to debts the issue is the donee's *right* to *appoint* as he thinks fit, which requirement, however, will be satisfied by proof that the terms of the power enabled the donee to appoint to himself. Thus a power which would be deemed general for the latter purpose will invariably receive the same construction for the former. This is demonstrated by the decision in *Re Penrose* (*supra*) where the donee of a power to appoint to a specified class of objects of which he was himself a member was held to have been competent to dispose of the property within section 22. Following the decision in *Taylor* v. *Allhusen*, [1905] 1 Ch. 529, Luxmoore, J., decided that the appointment by the donee to himself was legally valid and concluded: "A donee of a power who can freely appoint the whole of the fund to himself and so acquire the right to dispose of the fund in accordance with his own volition, is, in my judgment, competent to dispose of that fund as he thinks fit, and it can make no difference that this can only be done by two steps instead of one, *viz.*, an appointment to himself, followed by a subsequent gift or disposition, instead of by a direct appointment to the object or objects of his bounty" (*l*). This statement of principle is sufficiently wide to cover a power which excludes designated individuals other than the donee (*m*). The converse proposition, however, is not equally true, as it would appear that a power which unambiguously delimitates the class of objects and excludes the donee, may yet be such that, through failure to exercise it, the latter is competent at the time of his death to dispose of the fund subject thereto. This is admirably illustrated by the following example furnished by Dymond (*n*): Property is limited to A for life, remainder to his children B and C as he should

(*l*) [1933] Ch. 793, 807.

(*m*) The uncertainty felt by Dymond (p. 10) in view of *Re Byron's Settlement* (discussed below) is unjustified, because that was a decision on the Rule against Perpetuities and is, therefore, inapposite. The learned author concludes: "If, however, the donee's executors are not among the excluded persons it may be that the donee must be regarded as competent to dispose by analogy to the decision of the H. L. in *Drake* v. *Att.-Gen.* (*supra*)." *Sed quære*, is that the relevant test?

(*n*) *Death Duties* (1946), 10th ed., p. 9.

by deed or will appoint, and in default of appointment to B and C equally. B dies in A's lifetime and his estate passes under his will or intestacy to A. Even though A appoints the whole of the property by will to C, he was nevertheless competent to dispose of half the fund, because, by deliberately failing to exercise the power, he could have ensured that half the property would fall into B's estate and thus accrue to himself (*o*).

Moreover, a person who has a power to appoint to anyone except himself, or, one might add, a power to appoint to any person living at his death, though he is not competent to dispose during his lifetime, will be deemed competent at his death on the ground that the restriction on his power has been removed by his own demise (*p*). In conclusion, therefore, it is probably safe to assert that the comprehensive test of freedom of disposal includes all powers other than those to a restricted class of objects which does not comprise the donee (*pp*) or those which, though otherwise general, make the *selection* of the appointees dependent upon the approval of a third party (*q*).

(3) Perpetuity

In the case of special powers, the person to whom the appointment is made must be capable of taking under the instrument creating the power, *i.e.*, he is to be treated as a life in being only if in existence at the time of its creation (*r*), whereas in the case of general powers, the operative date is the occasion of its exercise. The favour shown to the latter is dictated by the view that the donee is free to deal with the fund in any way he pleases, whereas in the case of special powers the class of objects has been chosen and designated by the settlor and the ultimate selection by the donee is exercised in the capacity of an agent on his behalf. The only instance in which one of the third class of powers has been construed for this purpose arose in *Re Watts* (*supra*) where by a marriage settlement of 1904 property was settled by the prospective wife upon trust for herself for life, remainder to her children, but power was reserved for her to revoke all or any of the trusts and make an appointment or declaration of new trusts *with the consent* in writing of her mother, during the latter's lifetime. In 1913 the tenant for life, pursuant to and in conformity with the provisions of the settlement, resettled the property upon certain trusts, conferring, *inter alia*, benefits on the children of her only son upon their reaching the age of twenty-one. It being clear that, if the power reserved by the settlement of 1904 was special, the appointment infringed the Rule against Perpetuities, the nature of that power was put directly in issue. Bennett, J., pointed out that the solution depended upon whether the requirement for consent was designed solely to validate the appointment as a matter of formalities or whether it purported to ensure the concurrence of the third party in the selection of the appointees. He decided in favour of the second

(*o*) There is no actual judicial authority to substantiate this conclusion, but it is undoubtedly correct.

(*p*) Dymond, p. 10; Green's *Death Duties* (1947), 2nd ed., p. 54.

(*pp*) Subject to the exception noted above.

(*q*) See below, note (*y*).

(*r*) The period of twenty-one years is to be applied in the light of events prevailing at the time of the exercise of the power: *Re Paul*, [1921] 2 Ch. 1.

alternative having regard to the facts that (1) the settlement had been made in consideration of marriage, (2) the power of reservation and the appointment were restricted to the lifetime of the settlor's mother, and (3) the latter's consent was required in both instances. The donee was not, therefore, free to deal with the fund as she pleased, with the result that the appointment was bad. In order to reach this conclusion, the learned Judge felt constrained to distinguish the decision in *Re Phillips* (*supra*) where in a similar "consent" case it had been held that the property was available as equitable assets for the appointor's creditors. It is notable that, in order to escape the previous decision, he refused to accede to the argument that the criterion of distinction was different for the two respective purposes, and it is submitted that on the particular facts this view was undoubtedly correct.

Whether the construction of the consent requirement in *Re Phillips* as relating only to the formalities of the appointment was in accordance with the presumed intention of the settlor, as expressed by the terms of the power, remains a matter of doubt, and it is difficult to avoid the impression that this decision rested to some extent on a mistaken interpretation of *Re Dilke*, [1921] 1 Ch. 34, the first of the "consent" cases. There an unlimited power had been conferred on the tenant for life to appoint in favour of any person he should select with the consent and concurrence of at least three of the trustees. By a deed of 1918 to which the latter were parties he covenanted that the fund was to stand on trust for such persons as he should by will or codicil appoint. The question arose whether the appointments which he subsequently made by codicil were valid, in view of the fact that the trustees had not been consulted in the selection of the appointees or the extent of their shares. It was held by the Court of Appeal, affirming the decision by Peterson, J., that, on the true construction of the power, the trustees were not required to consent to the persons who were to benefit under the appointment, but that their consent to the exercise of the power was sufficient. In other words, the consent was required in order to give validity and effect to the appointment, but the selection of the objects of the power was left to the testator. As Warrington, L.J., put it, it was the duty of the Court to determine if the power was general or special, this characterisation depending on whether it was to be construed as being exercisable by the testator in favour of such person or persons as he pleased, although for the validity of its exercise the consent of the trustees and their concurrence in the deed was necessary or "exercisable only in favour of such persons as shall be approved by the trustees and ascertained or ascertainable by name or description at the date of the exercise of the power". In the former case it was general, in the latter special. The task of construction in *Re Dilke* was to some extent facilitated by the circumstance that the donee, at the time of the creation of the settlement, was a person of unsound mind, which favoured the view that the requirement of consent by the trustees was inserted in order to ensure that he was competent to exercise the power (*s*). It must be conceded, however, that this factor

(*s*) Cf. judgment by Peterson, J., at p. 36.

did not find specific expression in the judgments of the Court of Appeal, and thereby to some extent justified the view of Maugham, J., in *Re Phillips* (*supra*), that the decision furnished a precedent for the general proposition that the existence of a consent requirement did not, in the absence of contrary evidence deducible from the instrument, prevent a power from qualifying as general, at any rate for the purpose of making the fund equitable assets in the hands of the executors. It is respectfully submitted that *Re Dilke* was decided by reference to the special facts which indubitably existed in that case, and did not purport to furnish authority for the view taken in *Re Phillips* which is consistent only with the implausible construction that the necessity for the consent of the trustees was inserted for the benefit of the persons entitled in default of appointment (*t*).

Both *Re Phillips* and *Re Watts*, however, have established the point that in order to determine whether a consent requirement constitutes a sufficient fetter so as to reduce an otherwise unlimited power to that of a special power, the Court must ascertain the object which its insertion was intended to serve (*u*). Although Bennett, J., in the latter case seemed to imply that the same principles were applicable to the solution of this classification problem in both cases, it may well be that the equity of the creditors weighed heavily against the construction of the power as special, whereas the Court would, if at all, lean towards the opposite conclusion in relation to the Rule against Perpetuities.

A power which denies the donee the right to appoint to himself, as in *Re Park*, is without question special, since the limitation on his freedom of selection prevents his right over the fund to be described in terms of property. The same certainty, however, does not prevail in relation to powers such as that in *Re Byron's Settlement* which was unlimited but for the exclusion of specified individuals other than the donee. Whereas it must be conceded that the donee is not "free to deal with the fund in any way he pleases" on a literal construction of that phrase, it is legitimate to wonder whether the test propounded by Luxmoore, J., in *Re Penrose*, [1933] Ch. 793, 807, does not invite a contrary conclusion. The learned Judge, as will be remembered, suggested that it would "make no difference that this can only be done by two steps instead of one, *viz.*, an appointment to himself, followed by a subsequent gift or disposition, instead of by a direct appointment to the object or objects of his bounty". This principle of construction pronounced for the purpose of the Finance Act, 1894, would not necessarily be even of persuasive authority in the present context, were it not in some degree corroborated by Gray who explains the rule that, in the case of general powers, the remoteness of the appointment is to be determined from the time of its exercise, on the ground that the donee may, in fact, deal with the property as if he owned it in fee, because "the appointment can be considered as an appointment to the donee himself and then a settlement of his own property" (*v*). Some

(*t*) In certain circumstances it is, of course, clear that the exercise of consent is purely fiduciary, as, *e.g.*, where the objects are to be selected with the consent and approval of the trustees. See, *e.g.*, *Eland* v. *Baker* (1867), 29 Beav. 137.

(*u*) This distinction is also, probably, applicable to s. 22 of the Finance Act (*supra*). Cf. Green's *Death Duties*, p. 55.

(*v*) (1942) 4th ed., § 524, p. 509.

caution, however, is required in deducing from an explanation of an established rule of law a series of implications which may not have been present to the author's mind at the time of exposition. This consideration should be borne in mind particularly when construing the *Re Penrose* power for this purpose. It is strongly felt that the delimitation of a specified class of objects would prevent it from being regarded as general even although by a coincidence, as it were, the donee is himself included in that class. The suggestion advanced above that a contrary conclusion would probably be preferred in deciding whether the fund subject to such a power would constitute equitable assets was there based on the unambiguous tenor of the principle that, if the donee could have appointed to himself, he cannot be allowed to disappoint his own creditors by appointing to strangers. This approach may not have the same force in connection with the issue now under consideration. It will ultimately have to be decided on grounds of public policy and it would be hazardous to anticipate the conclusion with any degree of assurance. F. E. Farrer, in the pages of this journal (*w*), has expressed the tentative view that the third class of powers is to be deemed special for the purpose of the Perpetuity Rule, but it is conceived that different considerations may well be applicable to the two examples which he mentioned, *viz.*, powers excepting from its objects either the donee or third parties other than the appointor.

A *Re Jones* power to appoint to any person or persons living at the donee's death presents similar difficulties to those encountered in its characterisation for the purpose of administration. These are, indeed, enhanced by the uncertainty whether an appointment under a power general in its scope, but exercisable *only by will*, is to be referred to the date of its creation. Whereas *Re Powell's Trusts* (1888), 39 L. J. Ch. 188, and *Wollaston* v. *King* (1869), L. R. 8 Eq. 165, decided that it was special, the Court in *Rous* v. *Jackson* (1885), 29 Ch. D. 521, and *Re Flower* (1886), 55 L. J. Ch. 200, came to the opposite conclusion. Gray's argument in favour of the former line of decisions is of particular interest in this connection, because it selects a criterion which may also commend itself in relation to the construction of other types of powers. The learned author expressed the view that "if a man has the present unconditioned right to acquire the present absolute interest he is regarded by the Rule against Perpetuities as already having such interest. . . . A donee of a general power exercisable by deed is . . . such a person. To this extent the rule sacrifices form to substance; but the substance must be there. There must be a person who has the immediate right to become the absolute owner. Such is not the case where the donee of a power can only exercise it by will. The general rule must govern unless the exception is made out, and the exception is not made out unless there be a present right to acquire the present absolute interest" (*x*). If, therefore, this view should prevail, a *Re Jones* power must be deemed special in this connection.

(*w*) 1 Conv. (N.S.), p. 198.
(*x*) *Op. cit.*, p. 515.

(4) Section 27 of Wills Act

By section 27 of the Wills Act, 1837, general words of disposition have the effect of passing personal or real property "which the testator may have power to appoint *in any manner* he may think proper". The particular object of this provision was to abandon the technical distinction between unlimited powers, on the one hand, and property in the strict sense, on the other, so that, in the absence of any contrary intention, a general devise or bequest shall include the former, and thus be deemed equivalent to an express exercise. In order to safeguard this purpose, anything less than a power to appoint as the donee thinks fit is not equivalent to ownership, with the result that the existence of the slightest limitation on the generality of the power must be fatal. That the words "in any manner as he thinks proper" do not *prima facie* refer to the mode of execution appears to have been established by *Re Powell's Trusts* (1870), L. J. Ch. 188, where James, V.-C., held that a power to appoint to any person of the donee's choice by will (but not by deed) was within the section, though it will have been noticed that the same power was held to be special in relation to the Perpetuity Rule, thus emphasising once again that distinct considerations are applicable to these issues. It is obvious, of course, that general words will not pass a fund subject to a power to appoint by deed, because this is an Act dealing with wills and not *inter vivos* dispositions (*y*). The criterion determining the applicability of section 27 is, therefore, primarily whether the class of objects is unlimited. Thus in *Cloves* v. *Andry* (1850), 12 Beav. 604, it was decided that a power to appoint by will, deed or otherwise to the issue of X was outside its scope. Nevertheless, not only must the class of objects be totally unrestricted, but any requirement of special formalities to which its exercise is subject will prevent it from being caught by the section. Thus in *Phillips* v. *Cayley* (1890), 43 Ch. D. 222, where by a settlement the trustees had been directed to hold a sum of stock for such purposes as the settlor should . . . by a will expressly referring to the power appoint, and the latter had bequeathed his estate to trustees without, however, referring to the power, it was held by the Court of Appeal that the bequest did not operate under section 27 (*z*). Nor was this defect cured by section 10 of the Act; there was no conflict between the exercise and the instrument creating the power; the question was whether the power had been exercised (*a*). Thus while the distinction between special and general powers of appointment for the purpose of the equitable rule of administration and the Rule against Perpetuities refers to the extent of their objects alone, section 27 of the Wills Act is more exacting and necessitates an additional advertence to the formalities of the exercise. From this flows the consequence that, in the case of a power of appointment subject to the consent of a third party, the donee cannot appoint "in any manner he thinks proper", even if the requirement of consent is construed as relating to the formalities of execution rather than the

(*y*) See *per* Cotton, L.J., in *Phillips* v. *Cayley* (1890), 43 Ch. D. 222, 232. Cf. a fund subject to a general power exercised by deed, the appointment to take effect on the donee's death, is available to satisfy his debts: *Townshend* v. *Windham* (*supra*).

(*z*) Overruling in *Re Marsh* (1888), 38 Ch. D. 630. See also *Re Tarrant's T.* (1890), 58 L. J. Ch. 780, *Re Phillips* (1889), 41 Ch. D. 417.

(*a*) See *per* Bowen, L.J., at pp. 232–3.

selection of its objects, whereas in *Re Phillips* (*supra*) it was held that in those circumstances the fund was available for the satisfaction of the appointor's debts.

The comparatively narrow scope attributable to this section of the Wills Act is illustrated by the decision in *Re Byron's Settlement*, [1891] 3 Ch. 474, where by a settlement real estate had been conveyed to trustees for R for life and upon such further trusts for any person (not being the present husband of R or any friend or relative of his) as the tenant for life should by deed or will appoint. It was held that this power fell outside the ambit of the section, unless perhaps the excepted persons were dead at the time of its exercise. The object of the relevant section was described by Kekewich, J., in the following terms: "This is not apparently to overlook or alter the distinction between property and power; but on the other hand, it was intended to recognise what is familiar to all lawyers, *viz.*, that a general power of appointment, though in technical character certainly different from property, is in substance and practice so nearly resembling it that injustice may easily be done by preserving technical rules and insisting on their application". For that reason, "anything less than a power to appoint as he thinks fit is not equivalent to ownership. A power so to appoint, but with an exception, is something less than proprietorship. A man is not any more the proprietor of land or money if he has power to appoint to all the world except the children of A than he is if he has power to appoint to the children of B. It is, in either case, a power of selection, not ownership" (*b*). This interpretation equally disqualifies the other hybrid powers from falling within the operation of the section in question.

It is hoped that this analysis has confirmed the submission advanced at the outset that the rules of construction vary both in their application to the different types of these ambiguous powers and in respect of the distinct purposes for which classification is needed. Farwell's definition has, therefore, disclosed itself as inadequate because even in those legal situations where the nomenclature of *special* and *general* has taken firm root, as under the Perpetuity Rule and the A. E. A., it is too narrow to embrace those hybrid powers which have been the subject of discussion. While eschewing the desirability of abstract classification, the following legitimate divisions may be suggested: between *unlimited* powers which do not impose any restriction on the mode of exercise (*c*) and class of objects, and *limited* powers which represent the residue and may be subdivided by reference to (1) the existence of restrictions on their mode of exercise, and (2) the extent of their exclusion or inclusion of objects. These limited powers are susceptible of different construction and may be characterised as special or general or as falling within either class of other dichotomous divisions (which cannot, strictly, be called general or special, because they are defined by different terminology) according to the purpose of classification.

(*b*) At p. 479.

(*c*) Because it may be that powers of appointment exercisable by *will* only are regarded as special for the Perpetuity Rule. *Vide supra.*

THE ATTORNMENT CLAUSE

By H. R. Gray, LL.B., Solicitor of the Supreme Court

The Attornment Clause in a mortgage whereby the mortgagor attorned tenant to the mortgagee was a common form clause in mortgages before 1926. Originally the amount of "rent" for this fictitious tenancy was fixed at the same figure as the interest due on the loan, thereby enabling the mortgagee to distrain for interest as for rent. Since this amounted in effect to a charge on the mortgagor's chattels, on the passing of the Bills of Sale Act, 1878, such a power of distress had to be registered under the Act to be valid: *Re Willis*; *ex p. Kennedy* (1888), 21 Q. B. D. 384. Owing to the objection of mortgagees to the registration of their mortgages as bills of sale this was rarely done. Nevertheless the attornment clause continued to be used to enable the mortgagee-landlord by virtue of the "tenancy" to proceed against the mortgagor for possession of the land by way of a specially indorsed writ and summary judgment under R. S. C., Order XIV. Since 1937 when Order III, r. 6, was amended to permit any action for recovery of land to be commenced by specially indorsed writ, and the introduction of the present Order V, r. 5A and Order LV, r. 5A, which require all actions by a mortgagee for possession of the mortgaged property to be brought in the Chancery Division and preferably by originating summons, this clause has had little point so far as proceedings in the High Court are concerned. Its sole justification lies in the fact that under certain circumstances the Small Tenements Recovery Act, 1838, may be available for the summary recovery of possession by magistrates' warrant.

Despite this a form of attornment clause appears in the precedent books (see *K. & E.*, 14th ed., Vol. II, p. 79; *Encyclopædia of Forms*, 3rd ed., Vol. X, p. 130; *Prideaux*, 23rd ed., Vol. II, p. 379), and is widely used by solicitors as well as being included in the printed forms supplied to the solicitors of intending borrowers by building societies. It is worth while then to consider whether this clause has any real value.

First of all let us deal with the case where the clause admittedly has some effect. Under the Small Tenements Recovery Act, 1838, where a house or land is held on a tenancy at will or for a term not exceeding seven years either rent free or at a rent not exceeding £20 per annum, and the term has ended or has been determined by a legal notice to quit or otherwise, the landlord may apply to the justices for the summary recovery of possession. Though originally (as the title of the Act implies) intended to apply to the genuine letting of a small house, a Divisional Court of the King's Bench Division has held that possession may also be recovered in this way in respect of a yearly "tenancy" arising under an attornment clause: *Dudley, etc., Building Society* v. *Gordon*, [1929] 2 K. B. 105. Assuming that the tenancy is good, this seems correct in principle; it should, however, be noticed that this decision stands alone, unsupported by direct authority, and, as will be seen later, may be impeached on other grounds. It is conceived further that in addition to the requirement that the rent of

the premises should not exceed £20, the annual value also should be below £20 in order to confer jurisdiction on the justices. That is to say, it is not enough that the rent of the tenancy created by the attornment clause is one peppercorn if demanded, if the annual value in fact exceeds £20. (In *Dudley, etc., Building Society* v. *Gordon* (*supra*), the rental was 10s. and the annual value £13 10s.)

Though it is admitted that this procedure is available to a mortgagee-landlord by virtue of an attornment clause, this remedy is circumscribed and rarely used. Moreover, there must be a valid tenancy to bring the Act into play, and upon examination of the legal basis of this tenancy certain far-reaching questions of principle are raised.

Before 1926 the way in which a mortgagor could be regarded as a tenant at will was comparatively clear. In a mortgage of freeholds by conveyance with a proviso for reconveyance the mortgagee had the legal estate vested in him. The mortgagor had none, and in fact had only an Equity of redemption. If, however, there was an attornment clause the mortgagor could also have possession by virtue of the tenancy arising thereunder. It was this right to possession under the tenancy at will which the mortgagee could determine at any time and in respect of which he could apply for summary possession.

Since 1925 the circumstances under which the tenancy arises are rather more complicated but still valid. The effect of an attornment clause in a mortgage by demise (as in a mortgage of leaseholds before 1926) is, first that A the mortgagor is the landlord of B the mortgagee (by virtue of the mortgage term of 3,000 years) then that B the mortgagee is the sub-landlord of A the mortgagor (by virtue of the tenancy arising under the clause). Hence when B proceeds for summary possession the sub-tenancy comes to an end and B is himself entitled to possession by virtue of his mortgage term. This, though somewhat involved, is quite sound as the mortgagee undoubtedly has a legal estate out of which such a tenancy at will could be carved. Although the learned editor of the 1926 Supplement of *Halsbury's Laws of England* (p. 1564, para. 303) thought that the tenancy arising under the clause would be repugnant to the landlord-tenant relationship arising under the statutory mortgage term, this was not regarded as an insuperable obstacle by Clauson, J., in *Woolwich Equitable Building Society* v. *Preston*, [1938] Ch. 129, and it may be safely assumed that this is not a fatal objection.

The justification of the clause in the mortgage by demise is found to have much less substance when applied to a charge by way of legal mortgage.

Now, although section 1 (4) of the Law of Property Act, 1925, embraces such a charge under the general head of "legal estate" it is clear from the differentiation drawn between section 1 (1) (the legal estate proper, the fee simple and the term of years) and section 1 (2) (the "interests or charges in or over land" including the charge by way of legal mortgage) that the charge by way of legal mortgage is not a legal estate properly so-called out of which other legal estates properly so-called may be created, but only a charge capable of subsisting at law. Such a legal charge confers the same rights and remedies as a mortgage by demise (L. P. A. 1925, s. 87 (1)), but it

is submitted that it does not confer upon the chargee a legal estate nor any rights which are not conferred expressly by the Act on a mortgagee by demise, but which arise entirely outside the operation of the Act.

A mortgage term and a legal charge are not necessarily identical in effect. It is suggested for example that section 87 (1) does not make a charge of a lease containing a covenant against assignment and underletting such an underletting as to require the previous consent of the superior landlord, which would undoubtedly be required in the case of a mortgage by demise (see Cheshire, *Modern Real Property*, 5th ed., p. 589, quoting *Encyclopædia of Forms* [1935] Supplement No. 9, p. 1270). Again, it may be that a chargee would not be entitled as an underlessee to claim relief against forfeiture of a lease under section 146 (4) L. P. A., 1925 (but see Wolstenholme and Cherry's *Conveyancing Statutes*, Vol. 1, p. 373, in a note on section 87 (1) where the editors suggest that the words " as an underlessee " do not mean " being an underlessee ", and that, consequently, a chargee might be admitted to relief).

The chargee by way of legal mortgage may sell, enter into possession and so forth because section 87 gives him the power to do so as if he had a term for 3,000 years without impeachment. But it is submitted that he has only the powers conferred upon the holder of this statutory term by the Act itself. He has not the term itself and cannot grant a tenancy (except under the statutory power of leasing conferred upon a chargee in possession by the operation of sections 87 (1) and 99 (2)), because he has no legal estate out of which such a tenancy can be carved; consequently rights which would arise from the sub-tenancy and not from the Act cannot apply to him. *Nemo dat quod non habet.* (It may be observed further that the common form attornment clause deliberately negatives the suggestion that the chargee is exercising his statutory power of leasing in view of the strict accountability of the mortgagee in possession.)

A legal charge confers only a right to enforce repayment of a debt in certain specified ways out of certain property of the borrower. That being so, it is submitted that on principle no amount of attorning tenant on the borrower's part can possibly create a landlord-tenant relationship unless the chargee has a legal estate out of which a tenancy can be granted.

The question of the validity of the attornment clause has not been litigated to any great extent in recent years, due to the rarity of the cases in which the landlord-tenant relationship can be exploited. Moreover, when the matter has been before the Courts authority cannot be said to have invariably gone hand-in-hand with principle.

In *Re Kitchin*; *ex p. Punnett*, 16 Ch. D. 226, it was held that a mortgagor may attorn tenant to two successive mortgagees. Here both mortgages were by way of demise and consequently each mortgagee had a legal estate out of which the tenancy created by the attornment clause could be carved. In *Morton* v. *Woods* (1867), L. R. 3 Q. B. 658; 4 Q. B. 293, however, there were two successive mortgages by conveyance in each of which the mortgagor attorned tenant to the mortgagee. In an action arising from an attempt by the second mortgagee to distrain for the interest on his loan it was

held that the mortgagor-tenant was estopped from denying the mortgagee-landlord's title to distrain despite that the landlord's want of a legal estate appeared on the fact of the instrument. In this the Courts of Queen's Bench and Exchequer Chamber followed a single decision of Lord Chelmsford (reversing the Master of the Rolls who had held that a legal estate was necessary for a landlord to exercise his remedies as such : *Jolly* v. *Arbuthnot*, 28 L. J. Ch. 274 and 551). Lord Chelmsford's decision was regarded as binding by Kelly, C.B. (4 Q. B. 304) : " It is the estoppel which arises from the creation of the relation between landlord and tenant by agreement between the parties that makes the actual legal estate unnecessary to support the distress and not the consent of the third party in whom the legal estate is ". (See also the judgment of Blackburn, J., at 3 Q. B. 669.)

It is submitted that in their evident desire to give effect to the terms of the mortgage the Court rode roughshod over the decision of the Court of Queen's Bench in *Pargeter* v. *Harris*, 7 Q. B. 708. In that case the recitals of a lease showed that the lessors had only the Equity of Redemption; and Denman, C.J., in the course of his judgment said (at p. 728) : " That recital is of itself sufficient to prevent either party from being estopped from denying that the plaintiffs had a legal reversion; in truth it estops them from asserting it ". This was approved by the Court of Exchequer Chamber in *Cuthbertson* v. *Irving*, 6 H. & N. 135. Again, in the more recent case of *Schalit* v. *Nadler*, [1933] 2 K. B. 79, a *cestui que trust* was held to be unable to distrain for rent for the trust property merely because he was the beneficial owner. Ownership of the legal estate (which was in the trustees) was held to be essential.

In these circumstances which authority is to be preferred? It may be noted that in *Morton* v. *Woods*, *supra*, no less an authority than Joshua Williams, Q.C. argued that the mortgagee must have a legal estate to which the mortgagor could attorn tenant. Further, it is contended that, even though the attornment clause was only a device to enable the mortgagee to obtain the more satisfactory remedies of a landlord, it never reached the status of a legal fiction. Though the tenant could not deny his landlord's title it is submitted that he could not thereby confer upon the landlord an estate and a remedy which would not otherwise exist according to the law; the more so where it was manifest on the face of the deed that the landlord had no legal estate.

Again, even if *Morton* v. *Woods*, *supra*, is conceded to be correctly decided on the facts it is submitted that the right to levy a distress for non-payment of money is not on the same footing as a right to possession of the land. Where the mortgagee has no legal estate his only right to possession is that conferred by L. P. A. 1925, ss. 87 (1) and 95, and the operation of a rule of evidence cannot enlarge his legal charge into a legal estate.

The only recent case in which the question of the effect of an attornment clause in a charge by way of legal mortgage appears to have been litigated is *Dudley, etc., Building Society* v. *Gordon*, *supra*. In this case it is true the Court tacitly assumed that a tenancy had arisen by virtue of the attornment clause; but the case was argued exclusively before the Divisional Court on the issue of whether the

application for a warrant for possession under the Small Tenements Recovery Act, 1838, based on a mortgage brought "title" in issue so as to oust the jurisdiction of the magistrates. The mortgagor did not appear and the question of whether or not a tenancy really had been created was not brought to the notice of the Court. It was first assumed that the tenancy was validly created, a view which, it is now suggested, seems untenable. The judgments (Lord Hewart, C.J., and Avory, J.) are scanty and shed no light on the present problem, and it is therefore suggested that this case is no authority against the view now put forward.

Registered land presents more difficulty, due partly to the lack of authority on registered mortgages and partly to the somewhat ambiguous terms of the Land Registration Act, 1925, which in some cases leave the interests actually conferred a matter of conjecture only. Conclusions of a sort may nevertheless be drawn from the material available.

The registered charge introduced by L. R. A., 1925, s. 25 takes effect as a charge by way of legal mortgage. For the reasons given above it is submitted that it is not a legal estate but merely a legal right protected on the register, and that, in consequence, it is not possible for a tenancy to be created out of such a charge by attornment.

When the other mortgages are considered, however, the position is doubtful. Although the registered mortgagee by demise has an express term of years, it is no ordinary term. In unregistered land the mortgage term and a beneficial term of 3,000 years are regarded as being on the same footing, and this is the basis of the whole idea of the mortgagee's recovering possession with a landlord's remedies. But this is not so with a registered lease and a registered mortgage by demise; for with the one a new title is opened, for the other no title may be opened (section 19 (2) (b)), but instead a charge certificate is given just as if it were a registered charge. The express demise is not regarded as a demise at all but as a mere matter of words in effecting a charge. In the face of this one hesitates to predict what the Court will say is the nature of the mortgagee's interest.

A similar question awaits decision with the unregistered mortgage of registered land (section 106). Although expressed to take effect as if the land was unregistered it is clear that it does not. Even when a mortgage caution is put on the register the proprietor of the charge has neither the powers of a legal mortgagee nor those of an estate owner (sub-section (6)). It is clearly contemplated that the mortgagee will insist on having it enlarged into a proper mortgage even though other (unregistered) land is comprised in the mortgage. But between the lodging of a caution and the enlargement of the unregistered mortgage into a legal registered mortgage, the nature of the mortgagee's interest, whether legal or equitable, is unspecified by the Act and uncertain, until the Court resolves it.

These are problems that may repay investigation; but in the meantime, just in case perhaps, the attornment clause might be retained.

A natural caution among conveyancers still leads to the indiscriminate inclusion of an attornment clause in all forms of charge. Recent examples which have come to the writer's notice have included charges of blocks of flats and business premises where even in the case of an unregistered mortgage by demise the Small Tenements Recovery Act could not have applied. For the reasons given in this article it is submitted that the clause has no effect whatever in many mortgages, and is procedurally inappropriate in many more. It is suggested that this clause be entirely excluded from legal charges and the analogous registered charges, and employed only in those mortgages by demise in which it appears from the circumstances that the Act of 1838 is capable of application. The draftsman should ask himself : " Does the mortgagee take a legal estate in land large enough to grant a tenancy subsisting at law, or does the mortgage only confer a right, legal or equitable, to look to certain specific land for the repayment of the debt? " Only in the former alternative and where it is possible to proceed for summary possession, it is submitted, can the attornment clause have any value whatever.

CAVEAT EMPTOR

OR CONVEYANCING UNDER THE PLANNING ACTS

When Sir Francis Bacon, later Lord Chancellor of England, came to give a Reading upon the Statute of Uses, he described that Statute and the Statute of Wills as statutes " whereupon the inheritances of this Realm are tossed at this day as upon a sea ". This was quite a number of years after those statutes had been passed and the uncertainty into which they had cast the land law had become clear. Nevertheless, so soon after 1947 as the present suffices to show that such a description of the Town and Country Planning Act, 1947, and the Agriculture Act, 1947, would not be far-fetched. To some extent this is due both in the sixteenth and our own centuries to the fact that consideration of the land law as such played no part in the intentions of the framers of the legislation. The considerations behind both groups of statutes were social, not legal, and the changes wrought, therefore, are rather incidental than direct, though it is only fair to the framers of the Statute of Uses to say that they seem to have given much more thought to the effect of their Act on estates in land.

The essential point of this preamble is to emphasise that revolutions in the land law, based upon social considerations, take time to work themselves out—and their consequences may be wholly unexpected. Springing and Shifting Uses completely changed the course of conveyancing, as did Bargain and Sale, but both these features of our old land law were entirely unpremeditated results of the Statute of Uses. We venture to think that no less startling effects will emerge from the new legislation which carries us back to the new feudalism.

The general tendency in conveyancing will be to ignore this legislation as far as possible and to confine attention to a few official

searches in local land charge registries and rather generalised requisitions on title which will result in the common form reply : " the vendor is not aware of any " or " the purchaser should search ". This will show that the practitioner has kept up to date and protected himself against any aftermath that in most cases will not occur. Where land is acquired specifically for " development " no doubt much more consideration will be given to the matter because it then becomes an immediate question of " value ". But from what we have seen and heard about values we do not think that the public is yet fully aware of the consequences of this legislation, and in our view this question of value is better left generally where it belongs—to the province of the estate agent. Readers of the *Journal of Planning Law* will have seen some of the complications of figures and facts that are involved in this question of value and we do not feel that the ordinary conveyancer has the material to deal very satisfactorily with the points which may arise.

In this article we are concerned only with the possible implications of this legislation. If we have to repeat what we have written elsewhere and some of our subscribers may feel that they have read it elsewhere we crave their indulgence on behalf of those that have not and trust that a different presentation may not be without point. In our opinion too great consideration cannot be given to the problem of the relationship between this legislation and conveyancing.

The title to this article is designed to emphasise, perhaps, the greatest question which has arisen. So far as the owner in possession is concerned this legislation operates to restrict his activities; as, for example, that he now has only limited power to determine an agricultural tenancy where the tenant objects (Agriculture Act, s. 31), but subject to this his position requires no particular comment. It is when one person becomes entitled after another, as by purchase or by the falling in of a life, or as a lessor, that the Acts present great difficulty. The reason for this is plain. The social background behind this legislation provided for dealing with the man in possession just as the Statute of Uses attempted to deal with the " beneficial " owner. The effect of the planning legislation on other persons who might subsequently acquire interests was not essentially considered *vis à vis* the present owner in possession. This in turn led to the failure to define in any clear way what the interest of the owner in possession now is. Consequently, it has already been said by practitioners, and will be said again, that there is no fundamental change in the character of the interest of such owner but merely limits put to its enjoyment. This question, which can be solved ultimately only by judicial decision, is crucial. Whatever conveyancing devices are adopted or methods of registration, etc., used to protect purchasers the progress of conveyancing will finally depend to a large extent upon its answer.

(a) The Nature of the Present Interest in Land

The decline and fall in the law of tenures has obscured to modern eyes the true character of an " estate " in land. Properly speaking an estate " is a time in the land . . . and there are diversities of estates, which are no more than diversities of time " (*Walsingham's Case*, Plowd. 555), or, as Bacon put it, " all estates are but times of their continuances ". In those days to say that a man had a fee simple was

inadequate, for it was necessary to show whether he had a fee simple by tenure of knight service or socage, or as the case might be, and of his demesne or in seignory. It is true that during the later ages this tended to be lost sight of, but until December 31, 1925, the sale of a plot of land implied that it was of " freehold " tenure and not, *e.g.*, copyhold tenure, unless the contrary appeared. The quality of the interest was as important as its duration.

Because the law of tenures was really older and more highly developed in the formative period of the land law this relationship between estate and tenure has not always received the attention it deserves (but see Challis, *Real Property*, 3rd ed., pp. 4–22). Its importance in the present connection is that it illustrates the essential difference between limitations imposed on a particular tenant of land (using here the term " tenant " in its proper sense to include all persons holding land other than the Crown) which arise from the character of the holding and those determined by the nature and quality of the physical land itself.

The new Town and Country Planning Act (hereafter called the Act) differs from its predecessors in that it vested in the State all right to any future development of any land, though it also contemplates selling this right to private developers (*a*). The Agriculture Act goes even further with regard to agricultural land because control of the enjoyment of the land even for agricultural purposes is now also vested in the State; so, for example, if the Minister (*b*) decided that good estate management and good husbandry required a return to mediaeval methods we do not see how he could be prevented from enforcing these, at least in large measure, by Supervision Orders under section 14. Of course the Agriculture Act goes further and provides for dispossession

(*a*) There is, of course, in conformity with the older legislation and general character of the Act, nothing which directly declares that any property right is vested in the Crown or the Minister. It will, therefore, be argued that no such property right is created by the Act. All that section 12 provides is that permission shall be required for " development " and Part VII provides what price (" development charge "), if any, shall be paid for such permission. This, it will be said, does not operate to vest any property right in the Crown and does not alter the character of the fee simple. Actually these are two separate issues and an affirmative answer to the second would not necessarily require an affirmative answer to the first because the fee simple might remain unchanged notwithstanding that a property right was vested in the State. For example, the existence of a right to light over Blackacre does not affect the fee simple in Blackacre notwithstanding that the right to light could be stated in the terms of section 12 as " permission shall be required " to any use of Blackacre by the owner or occupier which will cause an unreasonable interference with the light to the dominant tenement. No one would now readily dispute that a right to light is a property right. The vital issue is that the Minister has the *right* to grant development rights and to charge for granting them. Nor must it be forgotten that there is nothing in the Act which requires this permission to be granted to the present owner of the land. Section 17 provides that " *any* person who proposes, etc.," may apply and we think that in practice developers who contemplate buying land will probably insist on obtaining such permission before taking a conveyance, if not before signing the contract. It is, therefore, submitted that the only reasonable interpretation to be put upon the effect of the Act as a whole is to hold that the development rights are vested in the State. Furthermore, it is consonant with the general growth of our property law, of which a recent development is the law of restrictive covenants, which are now, particularly since the Land Charges Act, properly regarded as property rights vested in the covenantee instead of mere rights *in personam* enforceable between the parties to the covenant. An even more recent growth, yet uncompleted, is that of the law of licences and options where the comparison between property rights and rights *in personam* is still causing difficulty. We think, personally, that it would be disastrous to embark upon the proposition that rights vested in the Crown and enforceable against owners and occupiers for the time being of land are not property rights.

(*b*) In fact the County Agricultural Committee: see SI 187/1948, Vol. 12, p. 215.

and acquisition by the State, but here control is more limited. Nor should it be forgotten that these same powers of acquisition for the purpose of development are vested in the Minister under the Town and Country Planning Act and it has already been suggested that where development is in the public interest the Ministry will not allow private owners to refuse development on their land.

From this it will be seen that the " new law of tenures " is more rigorous than its mediaeval counterpart. Under the old tenures the law did not permit such interference with the tenant provided he fulfilled his services and observed the other incidents of his tenure. Under the new law the limits of enjoyment are narrowly confined and the powers of enforcement are both more effective and more varied.

It is, of course, no part of this article to find far-fetched analogies and draw vague historical parallels. Our aim is to show that this new legislation has introduced, or re-introduced, into our land law a revolutionary change that goes to the root of the nature of interests in land. Formerly no one denied the importance in " title " to land of the law of tenures because it formed an inherent characteristic of the interest or estate of the owner. It is our submission that this aspect of the matter has its modern counterpart in the " permitted use " under the Act.

It was in conformity with the old Common Law, even under the reign of " tenures ", that any particular use to which a property could or could not be put was not a matter of title, because tenure did not require the property to be put to any particular use but only that certain services should be performed and other incidents observed. Since, therefore, the interest which the tenant had did not, as such, circumscribe his enjoyment and his interest did not imply that the premises were in repair (cf. *Ryall* v. *Kidwell,* [1914] 3 K. B. at p. 138), or that the neighbourhood was respectable (*Ward* v. *Hobbs* (1878), 4 App. Cas. at pp. 24, 25, 26, 29), no question of *title* was, in consequence, involved. The question turned not on the nature of the owner's interest in the land but upon the physical character of the land itself. This is no longer true; the " use " depends upon certain facts at a particular date and the actual physical characteristics of the land at any other date are immaterial.

Now in our submission the essence of the new position of the landowner is that his interest is in a particular " use " and that, in fact, he can only have a definite use determined under the Act. It is not, as it was before 1948, warranting fitness for any particular purpose, because, in fact, there is only one comparatively limited use to which the premises can be put and it is only this use which the tenant in fee owns. All other " uses " of which the physical land is inherently capable are now vested in the State and will be sold as and when and to whom the State sees fit. Consequently, the " use " affects the quality of the " estate " as did tenure and not merely the quality of the " land " as was formerly the case. Hence the question of " use " becomes a matter of *title* and not of *quality.* We may anticipate by showing the importance of this in a quotation from Williams, *Vendor and Purchaser* (4th ed., at p. 763) : " But it should be noted that non-disclosure, on the sale of land, of a fact material to the *title* of the property stands on a different footing from non-disclosure of a fact relating to its *quality.* The vendor's title is a matter which is exclusively within his own

knowledge, and he is bound to state it fairly; and his suppression of a fact material to the title may, according to the degree in which it affects the title, be a ground for rescinding the contract or for resisting its specific performance".

In thus arguing that the question of "use" is something more than a question of "quality" of land we can find a little modern support. Restrictive covenants, which perhaps most approximate to planning restrictions, have been treated as matters of title (*Re Wallis and Barnard's Cont.*, [1899] 2 Ch. 515; *Hone* v. *Gakstatter* (1909), 53 S. J. 286), so have covenants in a head lease on the grant of a sub-lease (*Melzak* v. *Lilienfeld*, [1926] Ch. 480), and so also have such matters as party wall notices, paving notices and similar statutory obligations (*Re Leyland and Taylor's Cont.*, [1900] 2 Ch. 625; *Carlish* v. *Salt*, [1906] 1 Ch. 335). These obligations fall far short of the limitation put by the Act on "use", but the greater the restriction clearly the greater the change in the character of the interest.

Some study of the General Development Order (SI 958/48) and the Uses Classes Order (SI 954/48), together with the Development Charge Regulations (SI 1189/48), lend point to our view that an owner in fee today owns only "a fee simple in the permitted use of Blackacre". It will be recalled that no "material change" in the use of the premises may be made without development permission (section 12). The wide sweep of material change is illustrated by the changes which are *temporarily* (*c*) permitted. For example, for the time being it is *deemed* not to be a development for the purposes of the Act if a shop changes from one kind to another, unless it is a cat's-meat, fried fish or tripe shop, or a shop for the sale of pet animals. Similarly, an office can be used as an office for any purpose and so on, but, for example, a private dwelling-house could not be used for a boarding or guest house, nor presumably conversely. Then, again, although it *is* a development a general permission has been given, *e.g.*, to change the use from a fried fish shop to any type of shop, but not, of course, conversely. Perhaps, however, the narrowness of these provisions becomes most impressive when it is pointed out that there is a *general permission* to develop by putting in gates, walls and fences, *provided that* they do not *either* (i) exceed seven feet in height *or* (ii) abut onto or give access to a highway.

Wherever there is a development there may (subject to special exceptions connected with Schedule III) be a development charge payable by the developer. This development charge is to be the difference in the value of the land subject to the restricted use and the value of the land together with the permission to make the development, in effect, one hundred per cent. of the value of the permission to develop. Consequently, at least in theory, no purchaser of land will pay to its owner anything more than its "existing use" value no matter what hopes he may have of development. Both in value and in enjoyment the owner in fee is limited to the "existing use", though he, like another, might be able to purchase from the State another existing use.

In these circumstances we find incomprehensible the body of professional opinion which seems desirous of regarding the legal estate in

(*c*) "Temporarily" because these statutory instruments can be altered at any time.

fee simple as being subject to the same rules as before and the question of title on this score to remain unaffected. Speaking of a fee simple Challis said (3rd ed., p. 218): "For all practical purposes of ownership, it differs from the absolute dominion of a chattel in nothing except the physical indestructibility of the subject". While we ourselves should not have used these words unqualifiedly of the present law before 1948, they are generally accepted as substantially correct. Since 1947, however, they bear no trace of resemblance to the facts. It is, therefore, thought that this change must be recognised by the Courts and that it will no longer be said that A has a fee simple in Blackacre, but that he has a fee simple in the "use as a private dwelling-house and curtilage with garage (*d*) of Blackacre". It may be that so clear a definition may not be made either for some time or at all, but we have preferred to act upon this assumption, since some assumption must be made in tackling these new Acts.

(b) Title to the "Use"

The greatest difficulty that the Act has presented to conveyancers is this question of title. Outlying questions and smaller points, such as the existence of enforcement orders, abatement notices, and tree or building preservation orders, are to a large, if somewhat ambiguous, degree covered by registration as local land charges: Local Land Charges Rules, 1948 (SI 1283/48). Consequently, they will be picked up by searches in the Local Land Charges Registry, and for the same reason it is most important to inquire about them prior to contract, lest the purchaser be debarred at a later stage from objecting to them on the ground of actual notice (*Re Forsey and Hollebone's Cont.*, [1927] 2 Ch. 379).

But for the main question, the real issue, the Act has provided no method by which owners of estates can define with precision the "existing use". On July 1, 1948, subject to a few exceptional provisions about temporary use and war damaged property, "absolute dominion" all over England was converted into some specific "use" or "uses"; all other uses took the wings of the morning and flew to the Minister of Town and Country Planning. But there is no record of that "use" in most cases, and it is obvious from what we have said that the "use" may be most detailed in character. Nevertheless, any unauthorised use, such as a new gate abutting a highway, may involve the occupier in an enforcement notice and further consequences. Furthermore, it is a fairly safe prediction that many unauthorised developments will take place in all innocence by occupiers. In many, if not most, cases these developments will be immaterial in fact and will not give rise to any adverse proceedings by the local authority, a circumstance often enough met with in respect of restrictive covenants, but the danger remains.

From the point of view of conveyancing, then, two questions immediately present themselves; first, the provision of evidence of the "use", and secondly, the evidence of title to it. Since the "use" depends upon the facts as with a title based on adverse possession the natural evidence is that of statutory declaration, supported by plan.

(*d*) The inclusion of garage is most important—it requires a development permission.

This may have the effect of making plans of greater importance than they were in unregistered conveyancing (see *Re Sharman*, [1936] Ch. 755). Where the "use" depends upon a planning permission granted after July 1, 1948, this will be registered by the local planning authority and will no doubt materially assist. If the development plan, when made, is sufficiently detailed this will also provide material evidence and should assist in preventing some more serious errors.

In our view, then, the "use" should be abstracted by an entry in the abstract against the date July 1, 1948, and in meticulous detail, as, for example,

> July 1, 1948. The premises coloured green on the accompanying plan were used as a single (*e*) private dwelling-house within the curtilage edged with red and the building coloured brown was used as a garage. The land coloured blue was used for agricultural purposes, and hedges (none exceeding seven feet) are shown on the plan on which the gates abutting the highway are also marked. The buildings coloured yellow were used as agricultural buildings.

This abstract would be proved by a statutory declaration, if required, and supported by searches in the local land charges registry and at the office of the local planning authority, and, of course, inspection of the land itself. A development permission granted after July 1, 1948, would be abstracted in the normal way—probably by supplying a copy—and the circumstances of the "existing use" on July 1, 1948, compared with the changed position.

The weak link in this chain is the statutory declaration which is not likely to have much effect on a local planning authority and does not help a purchaser very much. Consequently, as in the case of title by adverse possession, a purchaser will naturally seek to get his title on to title deeds in the ordinary course as soon as possible. It therefore seems logical that all title deeds executed subsequently to July 1, 1948, should include a declaration of existing use analogous to the details which would be abstracted. Once this has been done satisfactorily subsequent title to use should be comparatively plain sailing. The vital point is that the declaration should be sufficiently detailed. To realise the importance of this it is necessary only to glance over the elaborate categorisation in the Use Classes Order and the General Development Order. The very elaboration is probably one of the greatest obstacles to it being done at all. Nevertheless, if it is not done we then come to the point of the title of our article.

Any unauthorised development may have to be pulled down and the cost of destruction as well as the loss of use may fall upon the purchaser although technically they will be borne by the person by whom the development was carried out (section 24 (2)). It must be borne in mind that this could be the tenant or other occupier and not the vendor. Of course, non-compliance with an enforcement notice may also involve heavy pecuniary penalties (section 24 (3)). In the end a purchaser may find that he has an interest which he does not want and without hope of getting permission for the "use" which he needs.

(*e*) "Single" is important because if flats it would not be a "single" dwelling-house (s. 12 (3) (a)), and conversion normally requires a development permission.

Obviously the result could be ruinous, as, indeed, seems to have been one case already brought to our notice.

(c) Dispositions of the Use

So far we have apparently ignored in large measure our sub-title " conveyancing ". This is because there is undoubtedly a school of thought—and it may be a very large school of thought—which refuses to accept the revolutionary notions put forward in the last few pages.

It seems that this " School " is sub-divided. There are those who, while not accepting the full implications of the thesis we have developed, are yet satisfied that the implications of the new position of landowners require substantial modifications of conveyancing practice. In their view, as we understand it, the purpose of conveyancing is not only to pass a necessary and proper title but also to avoid doubts and difficulties that may arise even if strictly the law does not require express provision to be made. With this view we have every sympathy and have ourselves consistently adopted it as a conclusive and final argument for the conveyancing changes we have advocated and in practice the immediate results are much the same (*f*). The other view is that no major conveyancing change is involved. That the new Act is not substantially different in nature and quality from its predecessors and should be treated in the same manner. It may be convenient to consider for a paragraph or two the effect of adopting this latter attitude.

The result of this attitude would seem to be as follows. Enquiries should be made by the purchaser at the Local Land Charges Registry and at the local planning authority's office, but subject to this the contract will normally provide that the purchaser shall be deemed to have full notice of the permitted use and restrictions upon it, and presumably no requisitions affecting it would be answered. Following upon this no mention is made of the permitted use in the conveyance. The title, therefore, remains clear of all references to the use. Whether the same *laissez-faire* attitude is to be adopted in connection with leases we do not know, but ordinarily a lessee is no better able to ascertain the permitted use than a purchaser, while by his acts the lessee may provide trouble for his lessor.

One of the immediate results of this policy is that a purchaser must, for his own protection, continue the actual use at the time of purchase. If he wishes to make a " material change " he must get a development permission and it is then that a planning contravention is most likely to come to light. This point must be borne in mind very carefully by purchasers who accept such a contract where they contemplate an immediate development. It is particularly important, in the case of immediate, or early, development because apparently any " development ", that is change of user, may become prescriptively lawful four years after it has been carried out (section 23 (1)). For example, if one can carry on a fried fish shop for four years without the planning authority noticing it, it may be possible to do so for good, subject to a

(*f*) The difficulty of their position will emerge when the inevitable disputes arise between parties where express provision has not been made. In our opinion gradually they will be forced to more decisive conclusions, but they will, we hope, have the advantage of judicial guidance.

discontinuance notice in respect of which compensation is payable (sections 26, 27).

Another result of this policy should be to put the purchaser in a very awkward situation if he wishes to borrow on the security of the property. Whatever reasons might decide a purchaser to risk the validity of the *actual* use of the property there seems to be no justification for a mortgagee taking the same risks. Obviously if he lends only within a very generous margin the "permitted use" may be immaterial, but this puts considerable restriction upon the borrowing capacity of the owner of the property.

Such a purchaser also takes a risk that he may find in later years that his title is less marketable if, as is to be hoped, the practice of conveyancers hardens against him. He will be in the position rather of an owner by adverse possession, without any real evidence unless he subsequently gets a development permission covering the whole of the "use".

Therefore, even if a purchaser is not entitled under an open contract to evidence of title to the use—as we think he is—nevertheless we think that prudent purchasers will insist on a contract which gives them this required protection. Space does not permit us to elaborate all the various points that should be made, but we propose to outline some of the principal features that should appear in the "new conveyancing". We hope that a careful consideration of these points may not only help in day to day practice but also bring home the magnitude in the change of the position of owners of interests in land.

(i) *Contract*

(a) An adequate description of the use should appear separately from the normal description of the property. In the normal description the use of such expressions (usually copied from old parcels) of such words as "dwelling-house" may be dangerous; for example, if the property is sold by description as a dwelling-house and it then turns out that it is sub-leased as two flats. In our opinion the contract would not be enforceable as it is now something substantially different: see *Charles Hunt* v. *Palmer*, [1931] 2 Ch. 287.

To avoid doubts we would be inclined to append an express provision that the conveyance will contain a declaration of the use and covenants for title to include such use. Provision should also be made for the title to be deduced to the use.

(b) Preliminary inquiry should ensure that the contract is made expressly subject to any other obligations under the Act affecting the property, notwithstanding that they may be registrable under the Land Charges Act, such as abatement notices, enforcement notices, and trees or buildings preservation orders. Development charges will not normally attach to the land, but they may be secured by some form of charge on the land which will require to be disclosed like any other charge.

(c) If the land is agricultural land it will also be necessary to investigate the possible existence of a "supervision order": Agriculture Act, s. 12. This will be registered as a local land charge, but change of owner does not affect its validity unless the change is made with the consent of the Minister (s. 13), and in fact, if a supervision

order is in force a purchaser would only complete after many inquiries. There are also a number of minor directions, such as pest and weed control : ss. 98, 99.

(d) The existence of a tenancy is peculiarly important in agricultural land, because it is now very difficult to get rid of a tenant unless he is willing to quit : Agriculture Act, s. 31.

(e) Although section 86 of the Agriculture Act is apparently not yet in force it is also well to ensure that any agricultural land is sold as a unit or units (*g*). If it is not so sold and section 86 is in force the consent of the Minister is necessary to the sale subject to the sanction that the land may be compulsorily acquired.

It should be observed that the peculiar position of agricultural land is cumulative—it is subject to both Acts. The General Development Order (SI 958/48) gives a general development permission for various types of agricultural development, *e.g.*, silos not exceeding 14 feet in height, wells and reservoirs or water tanks not exceeding 14 feet in height or 20,000 gallons in capacity, and the Development Charge Regulations (1188/48) exempt from development charge any building or operation (*other than* the erection, enlargement, improvement or alteration of dwelling-houses) requisite for the farming of the land. It will be observed that sometimes a planning permission will be required though no development charge is payable and peculiarly enough the County Agricultural Committee might think the " fixed equipment " inadequate for the purposes of section 10 of the Agriculture Act (good estate management) and the local planning authority refuse to give the necessary permission to enable the owner to provide or improve the fixed equipment. No doubt this would be an extreme case, but it does not pass the bounds of possibility.

(ii) *Conveyance*

Probably the most controversial topic is the additions (if any) to be made to the form of conveyance. If no provision is made in the contract it will be difficult, at any rate in some parts of the country, to compel vendors to accept any but the old form of conveyance. This may not, and we think should not, remain either the law or the practice. In our view the parcels should carefully avoid words describing the " use " of the land—for example, the common form " messuage or dwelling-house ". There is no harm in " messuage " for it is vague enough (Shep. T. 12), but dwelling-house may be a misdescription. Of course, if the vendor objects to a declaration of the " use " then a description in the parcels may help a purchaser if he has been misled, but is our view the " use " should be very circumstantially set out in a separate declaration. This will then form a root of title to the use for further transactions and, probably, it would have the effect of entitling a purchaser to sue on the covenants for title if it is wrong. It is, however, better to have an express clause bringing the declaration within their scope.

(*g*) Splitting up agricultural units *may* also constitute a material change of use. We do not think that this can happen often and it does not seem right that merely to split up units should be treated as change of use, but it is open to argument—in our view use as two dwelling-houses instead of one does not strictly alter the use in common language, but this does so for the purposes of the Act, therefore, use as two farms instead of one might be regarded, at least in some circumstances, as a change of use.

If the land is subject to any specific restrictions, such as a tree preservation order, it would seem to be an incumbrance subject to which the land must be conveyed unless the vendor wishes to be liable on his covenants for title. In this respect it seems irrelevant whether or not they have been disclosed to the purchaser in the contract or, indeed, recited in the deed: *G. W. Ry.* v. *Fisher*, [1905] 1 Ch. 316.

If the land is agricultural land what we have said equally applies, but it seems desirable to anticipate section 86 of the Agriculture Act and declare whether or not the conveyance includes one or more units. If, of course, it is intended to split up into farms of different sizes from the subsisting ones, this declaration must be avoided.

(iii) *Leases*

That the Agricultural Holdings Act, 1948 (replacing the Agricultural Holdings Act, 1923, as amended by the Agriculture Act, 1947), has introduced momentous reforms in the law of agricultural tenancies needs no labouring here, and the matter has been dealt with elsewhere in this Journal. We need only deal here with questions arising from "restricted use".

Under the old law there was no more an implied undertaking that premises were fit for the purposes they were intended to be used (*Manchester Bonded, etc., Co.* v. *Carr* (1880), 5 C. P. D. 507) than in a contract for sale that the premises were suitable for any particular purpose (*Ward* v. *Hobbs* (1878), 4 App. Cas. 13; *Cheater* v. *Cator*, [1918] 1 K. B. 247). Furthermore, subsequent impossibility to use the premises did not relieve the tenant of liability (*Cricklewood Property Co.* v. *Leighton's Investment Trust*, [1945] A. C. 221; cf. *Denman* v. *Brise*, [1948] 2 All E. R. 141). And interference by a planning authority could not, it is thought, be a breach of the covenant for quiet enjoyment, even if the landlord had let the premises expressly for a purpose involving planning contravention: cf. *Pease* v. *Courtney*, [1904] 2 Ch. at p. 512.

It is, however, equally obvious that the tenant can act very adversely to the landlord. He could create developments without permission which could be a source of expense and embarrassment to the landlord as well as himself. He might even obtain a planning permission and make alterations in the use which would be against the wishes of the landlord and the landlord could not, of course, revert to the former use without another permission.

Whatever may be done with regard to conveyance it seems clear enough that leases will have to incorporate provisions to deal with the Act. There appear to be four principal provisions: (i) the declaration of existing use; (ii) maintaining the existing use except by consent; (iii) the burden of development charge, if any, as between lessor and lessee; and (iv) provision to ensure that the lessor receives all notices or orders, etc., under the Act. It should also not be overlooked that the existing use may be frustrated by a planning change, but some reliance may be placed upon the compensation provisions of section 20.

(iv) *Mortgages*

What we have said concerning leases applies with still greater force to mortgages. The mortgagee is interested only in retaining the value

of his security or realising it with as little trouble as possible. If he has no available evidence of all matters connected with the " use ", obviously he is handicapped both in valuing and in realising his security. While the question of frustration does not arise, it is equally clear that a planning change could alter the value of the security so that, when the mortgage is by instalments, it is desirable that any planning change shall operate to make all instalments immediately payable. Obviously there would be other differences from leases, as, for example, the development charge would always be payable by the borrower, but the principle that the " use " must form the basis of the whole transaction remains true.

(v) *Settlements*

Perhaps one of the most difficult problems of all is the position of the settlement. To commit a planning contravention would probably be waste (see *Doherty* v. *Allman* (1878), 3 App. Cas. 735), though the question cannot be divorced entirely from the issue whether or not " use " is now a matter of title. The point is further confused here with the problem of " meliorating " waste (*Doherty* v. *Allman, supra*). If, indeed, as we think that it is, a change of " use " is waste, draftsmen may need to consider more carefully than they sometimes do whether or not they should include the words " unimpeachable for waste " in limiting life interests. It is vital to remember that change of use may prevent reversion to the original use. For example, to let the family mansion house as three separate dwelling-houses is clearly a change of use, and equally clearly needs a planning permission. At the moment it does not seem to carry a development charge : see section 69 and Schedule III. But to revert to a single dwelling-house would also require a planning permission and might carry a development charge.

Reference to development charge brings out another difficulty. Although investment under section 73 of the Settled Land Act can include payment of development charges (section 71 (4)), and money can be raised under the Settled Land Act to meet the charges (*ibid.*), nevertheless the question remains how far, as between remainderman and tenant for life, this is desirable. Having regard to the decisions in *Re Wakeman*, [1945] Ch. 177, and *Re Wellsted's Will Trusts*, [1948] 2 All E. R. 209, section 73 of the Settled Land Act cannot be regarded as a " power " of the tenant for life and, therefore, attempts to exclude it should not be void under section 106 of the Act. Although section 73 is imperative in form it could at least be argued that a life interest determinable on such an investment (without consent of the trustees) would not be invalid and would be effective to prevent any change by the life tenant.

The problems which arise from these points are too intricate for detailed consideration here, but they serve to illustrate the fact that the interest settled is a particular " use " and not the old-fashioned estate comprising many alternative uses. If there is a material change in use, normally carrying a development charge, the tenant for life must buy the new use from the State out of capital moneys or at his own expense.

One peculiarity is that an unauthorised change of use may, in lieu of an enforcement notice, lead to a compulsory development charge imposed under section 74 of the Act. This is quite likely to occur,

because many contraventions will be made unwittingly. This development charge can also apparently be paid out of capital money (section 71 (4)), and the money be raised by the tenant for life by mortgage under section 71 of the Settled Land Act (*ibid.*).

If, however, the unauthorised development leads to an enforcement notice and the development is removed, the obligation to pay the expenses of removal fall on the tenant for life (section 24 (2)), but any other damage to the premises are not provided for by the Act. Once again no doubt the question of waste arises, but, where the tenant for life is unimpeachable (and perhaps where he is), some more direct provision may be desirable.

Turning to the Agriculture Act, 1947, there is even more cause for thought. The power of the County Agricultural Committee to make supervision orders for failure to maintain good estate management cuts right across the old rule that a tenant for life was not liable for permissive waste (*Re Cartwright*, 41 Ch. D. 532). The failure to comply adequately may be followed by compulsory acquisition (section 16), although notice in this case must be given to any *registered* trustees or remaindermen (section 16 (6)), who may require the matter to be brought before an Agricultural Land Tribunal. It seems clear enough that the requirements of good estate management, especially when coupled with good husbandry if the tenant for life is in occupation, will involve expenditure well outside Schedule III of the Settled Land Act. Some provision should be made for this, but it seems probable that some provision should also be made for wilful refusal to comply with the requirements of the Act by the tenant for life.

It should also be noticed that under the Agricultural Holdings Act, 1948, s. 24, there are great restrictions upon notices to quit agricultural tenancies. There does not seem to be any way of limiting the power of the tenant for life to make agricultural tenancies by reason of section 106 of the Settled Land Act.

The effect of these provisions leave the settlor with less power to provide a landed inheritance for his children and his children's children. In order to carry out this intention so far as the law allows will undoubtedly call forth all the conveyancer's ingenuity.

(d) An "Estate" in a "Use"

All the difficulties that we have mentioned in the course of our brief summary of conveyancing points arise from the fact that an estate owner for the time being can dispose only of a "use". The land can obviously in many cases be used for many different purposes, but if any other "use" is sought the estate owner can only purchase it from the State and by so doing will normally destroy the "existing use" unless what he buys is merely an enlargement of it, say from 15,000 cubic feet to 50,000 cubic feet.

In itself this change would be no matter for grave concern legally, if the title to the "use" was as plain as the limitations put upon it. We may illustrate this once more from the history of that other piece of "social legislation", the Statute of Uses. Older conveyancers at least are so familiar with the words "unto and to the use of" in conveyances that they have forgotten why they became "common form". They were due to precisely the same causes as give reason for

disquiet today. Equity had provided a number of reasons, such as the resulting use, why the legal estate should not stay with the grantee of the legal fee. There would be nothing on the title to disclose this resulting use, and, therefore, a purchaser from the grantee might get nothing at all. The addition of the five words " and to the use of " protected a purchaser from this difficulty. The legal estate had to remain in the grantee because of the doctrine about a " use upon a use ". Essentially the difficulty was the same in both Acts; adverse rights of third parties that do not necessarily appear upon the title.

Under the new Act conveyancers cannot get much benefit out of the equitable doctrine of *bona fide* purchaser. If Blackacre is bought as six flats but legally capable only of being a single private dwelling-house, it is useless for the purchaser to tell the local planning authority that he inspected the premises and got no notice of their adverse right. It does not alter the fact that the only authority capable of permitting " use as six flats " was the Minister. Therefore, instead of trying to keep " adverse " uses off the title it becomes necessary to bring the " existing use " on to the title, which is the converse proposition to the old conveyancing device of " unto and to the use of ", or the more recent device of the " trust for sale " (cf. *Re Soden and Alexander's Contract*, [1918] 2 Ch. 258). It has to be converse, because the adverse rights of the planning authority in the land are legal rights and the adverse rights in the other cases were equitable rights. But truly speaking there is another reason also. Under the Statute of Uses or under a trust for sale the rights, though adverse to one another and, therefore, technically different, were rights in the same legal thing, but this is not *really* true of the position under the Town and Country Planning Act. A single dwelling-house is not the same legal thing as six flats, though the bricks and mortar may be the same. An agricultural holding is legally a different matter from a recreation ground. Let the buyer, or the lessee, or the mortgagee, beware that he does not acquire something different from what he saw or thought he saw.

HAROLD POTTER.

THE INCIDENCE OF OPTIONS TO PURCHASE LAND

By RICHD. A. HOLLAND, LL.B.(Lond.), Solicitor

An option is a right granted by one person to another, and exercisable at the will of the latter, to conclude a binding contract with the grantor. Every contract really commences with an option; because every contract commences with an offer, and until the offer is withdrawn or expires the offeree has the right to accept it, and thereby to conclude a binding contract. The distinguishing characteristics of what is usually called an option, however, are that the offer upon which it is founded is made by a separate preliminary contract granting the option and cannot be withdrawn, and will not expire unless the option is specifically limited in time.

In this connection, it is important to bear in mind the twofold effect of granting an option to purchase land. First, it vests in the grantee an immediate equitable interest *in rem* in the land; and secondly, it confers upon the grantee the right to conclude with the grantor a contract *in personam* binding at law. So far as regards the creation of the interest *in rem*, the option is subject to the rule against perpetuities, but that rule is not concerned with contracts *in personam*.

The grantee can assign his equitable interest, and under section 136 of the Law of Property Act, 1925, there can be a legal assignment of the contractual right, and an assignee may accordingly be in a position to obtain specific performance or damages.

If the grantor parts with the land in respect of which the option has been granted, the assignee (unless he be a *bona fide* purchaser for value without notice) is *prima facie* subject to the equitable interest (although the Land Charges Act, 1925, has modified the position in this respect) but cannot be sued on the personal contract, to which he was not a party. As the rule against perpetuities applies to the grant of the equitable estate *in rem*, that rule may protect a subsequent owner who is sued for specific performance, although it will not affect a claim against him for damages (*Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532; 75 L. J. Ch. 761). The grantor of the option, however, is liable on his personal contract, and the rule against perpetuities has no effect on this, and while he remains the owner of the land the Court has jurisdiction at any length of time to grant specific performance also, and this jurisdiction is founded not on the equitable interest in the land which the contract is regarded as conferring on the grantee but on the simple ground that damages will not afford an adequate remedy (*Hutton* v. *Watling*, [1947] 2 All E. R. 641).

An option to purchase the freehold reversion is often granted in a lease by a covenant by the lessor with the tenant that upon the tenant giving notice, usually within a specified time and subject to stated conditions, the tenant shall be the purchaser of such freehold reversion. Such a provision being in form a covenant by the lessor, it is relevant to consider whether it runs with the land.

There appears to have been no liability imposed by common law on a purchaser from a lessor in respect of the latter's covenants, but a limited right was given by the statute (1540) 32 Hen. 8, c. 34, which (together with sections 10 to 12 of the Conveyancing Act, 1881) was repealed by the Law of Property Act, 1925, and replaced by sections 140 to 142 of that Act. Section 142 has the effect of making purchasers liable on covenants "entered into by a lessor with reference to the subject-matter of the lease". With regard to what covenants have reference to the subject-matter of the lease, Dr. Cheshire has suggested (*Modern Real Property*, 5th edition, p. 191) that the proper inquiry should be whether the covenant affects either the landlord *qua* landlord or the tenant *qua* tenant. The general rule is to inquire whether the covenant "touches and concerns" the land or whether it is a personal covenant. If the covenant touches and concerns the land it will bind the covenantor and, running with the freehold reversion, will bind also the persons deriving title under him; but if the covenant is a personal covenant only it will bind no-one other than the persons actually entering into the covenant and their estates. It appears to be well established

(and in particular by *Woodall* v. *Clifton*, [1905] 2 Ch. 257 (C. A.)) that a covenant conferring an option to purchase the freehold reversion is not a covenant affecting directly or concerning the land; but is collateral to, independent of, and not incidental to the relationship of landlord and tenant. This was confirmed categorically although *obiter* by Uthwatt, J., in *Re Hunter's Lease, Giles* v. *Hutchings*, [1942] 1 All E. R. 27; 192 L. T. 284, in the words "One has, therefore, the authority of the Court of Appeal . . . that an option to purchase given to the tenant does not touch and concern the thing demised". It is true that section 79 of the Law of Property Act, 1925, has the effect of making the covenant conferring the option by the grantor "on behalf of himself and his successors in title and the persons deriving title under him" but it is thought that this merely has the effect of importing additional words into the covenant in case they are not expressed, and does not create any liability which could not be created by the deed. In *Austerberry* v. *Corporation of Oldham* (1885), 29 Ch. D. 750; 40 Digest 305, 2618, Lindley and Fry, L.JJ., gave it as their strong opinion that, apart from the case of landlord and tenant, the burden of a covenant can never run with the land of the covenantor at law. As a covenant conferring an option is not made by a landlord as such in favour of a tenant as such, it is clear, therefore, that a covenant conferring an option is not within the purview of section 142 of the Law of Property Act, 1925, and does not run with the land at law; so that a purchaser from a lessor who has granted an option is not bound by the option at common law. There is a slight difficulty in reconciling this with what was said by Romer, L.J., in *Woodall* v. *Clifton, supra*: "A contract in a lease giving an option of purchase might be good without regard to the provisions of the statute of Henry VIII, as binding the land in the hands of the heirs or assigns, provided it did not infringe the law as to perpetuities". Obviously the covenant either runs with the land at law or it does not, and it is thought that Romer, L.J., must have been referring to the equitable position, which would be equivalent to ". . . as binding the heirs and assigns in whose hands it is . . .".

The privity of contract between the parties to the original covenant remains, however, and the lessor remains liable at common law on the covenants notwithstanding that he has assigned the reversion (*Eccles* v. *Mills*, [1898] A. C. 360; 31 Digest 424, 5699; *Stuart* v. *Joy*, [1904] 1 K. B. 362 (C. A.); 31 Digest 432, 5768) unless, on the special terms of the covenant, the liability is only enforceable against the owner for the time being (*Bath* v. *Bowles* (1905), 93 L. T. 801; 31 Digest 432, 5770). Whether the special terms of a covenant so provide is a matter for determination on the true construction of the covenant in each case separately. In the absence of such special terms, however, the grantor of an option clearly remains liable at common law on his covenant even after he has parted with all his interest in the land.

Turning to the position in equity, the grantee of the option has an equitable interest in the land (*London & South Western Ry.* v. *Gomm* (1882), 51 L. J. Ch. 530; 46 L. T. 449), and this is supported by *Oppenheimer* v. *Minister of Transport*, [1941] 3 All E. R. 485. It should be noted that the interest of the grantee of the option is not *qua* lessee, so that privity of estate does not arise in this connection.

Before the commencement of the property legislation of 1925, the position in respect of such an equitable interest of a purchaser from a lessor who had granted his tenant an option to purchase was governed by the doctrine of notice, namely, that everyone who came to the land was bound by the equitable interest, excepting a *bona fide* purchaser for value without notice (*Pilcher* v. *Rawlins* (1872), 41 L. J. Ch. 485; 7 Ch. App. 259). And such notice might be actual, constructive, or imputed.

It appears to be well established that a purchaser, who before 1926 bought from a lessor who had granted his tenant an option to purchase, was subject to the equitable interest of the tenant as grantee of the option (*Barnhart* v. *Greenshields* (1853), 9 Moo. P. C. C. 18; 20 Digest 301, 552). The Digest of this case states "Where a tenant is in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor. This equity of the tenant extends not only to interests connected with his tenancy but also to interests under collateral agreements". That is, such a purchaser would be affected with constructive notice of the option, even if he had not actual notice.

The policy of the 1925 property legislation was to substitute for notice entry in a register provided for the purpose, the effect of registration being to give notice to the whole world. To this end, section 10 of the Land Charges Act, 1925, provided for the registration of certain interests and estates as land charges, and of these class C (iv) is expressly stated to include "a contract conferring either expressly or by statutory implication a valid option of purchase, a right of pre-emption or any other like right" and section 198 of the Law of Property Act, 1925, provides that registration under the provisions of the Land Charges Act, 1925, is deemed to constitute actual notice to all persons and for all purposes. Further, by section 199 (1) (i) of the same Act it is provided that a purchaser shall not be prejudicially affected by notice of any instrument or matter capable of registration under the provisions of the Land Charges Act, 1925, which is void or not enforceable as against him under that Act by reason of the non-registration thereof. The effect of non-registration is under section 13 (2) of the Land Charges Act, 1925, that the option is "void against a purchaser of the land charged therewith or of any interest in such land unless the charge is registered in the appropriate register before the completion of the purchase" with a proviso that as respects, *inter alia*, an option "this subsection only applies in favour of a purchaser of a legal estate for money or money's worth". Estate contracts are saved from Part I of the Law of Property Act, 1925, by section 6, *i.e.*, they cannot be over-reached, but they are not saved from the operation of the Land Charges Act.

There is nothing in the Land Charges Act, 1925, or in the Rules thereunder to say upon whom is cast an obligation to register; indeed, there appears to be no obligation to register, but merely that certain results follow if registration is not effected. It has in the past undoubtedly been the general custom that land charges are registered (if at all) for his own protection and advantage by the person who is entitled to the benefit of the matter to be registered. In the case of an option, it would be registered by the person entitled to exercise it, in

order to bind persons deriving title under the grantor of the option. The person subject to the burden of the matter to be registered has usually been quiescent in the belief that the other party could register if he wished, and that in the absence of such registration any disadvantage which there might be would accrue to the other party. To draw attention to the fallacy of this attitude is an incidental object of the present article.

Although the foundations of such an attitude are not exactly petrous, there are grounds of a sort. In *Turley* v. *Mackay*, [1943] 2 All E. R. at p. 2, Uthwatt, J., said, " In my opinion, the point of the Land Charges Act, 1925, s. 10, so far as it gives a right to register a land charge is to secure that obligations affecting land may be registered by persons who have a commercial interest in seeing that such obligations shall be carried out ". Again, section 12 of the Land Charges Act, 1925, provides that the expenses incurred by " the person entitled to a land charge . . . in causing the charge to be registered in the appropriate register . . . shall be recoverable by him ", presumably from the estate owner. Sub-section (2) particularly states that the section does not apply to, *inter alia*, an estate contract, but it is thought that the reason for this is that an estate contract is not a monetary obligation : it may be thought that the section as a whole shows that it was contemplated that a land charge would be registered by the person entitled to the benefit of it, and not by the estate owner. Further, in Emmet's *Notes on Perusing Titles*, 12th edition, Vol. 2, at page 289, it is stated, " In considering the title to land there may be charges, liabilities and equitable interests affecting the land which will not be disclosed by the abstract and which even an inspection of the property will not bring to light. The object of the Land Charges Act is to supply the deficiency so far as the same affect a purchaser, and by compelling all persons claiming such charges, etc., to register same, and by providing that unless they do their claims will be void as against purchasers for value of the land ". Although an option would be disclosed by a proper abstract, and revealed by reference to the tenant of the land, it may be thought that the principle applies. And further, section 200 (4) of the Law of Property Act, 1925, refers to " the obligation to register a land charge in respect of . . . any estate contract ". In Hill and Redman's *Law of Landlord and Tenant*, 10th edition, at p. 125, it is stated, " An option to purchase can be registered on the Register of Land Charges as an estate contract but unless it is expressed to be exercisable against the lessor's successors in title there does not seem to be any advantage in registering it ". This is undoubtedly true so far as the common law position is concerned, but it is submitted on the grounds given above that the advantage of registration is equitable, and that registration ensures that the grantee of an option will not lose his right to sue for specific performance, although it is true also that the fact that an option to purchase can be registered as a land charge has not altered the nature of the covenant, that is, has not made it run with the land.

Recapitulating, (1) at common law a covenant granting an option to purchase binds, and binds only, the actual covenantor and his estate; (2) in equity, the interest created by the grant of an option binds all who come to the land, excepting a *bona fide* purchaser for value without

notice, and those deriving title under him; (3) the Land Charges Act, 1925, and the Law of Property Act, 1925, have substituted registration for notice.

It was against this background that the recent case of *Wright* v. *Dean*, [1948] 2 All E. R. 415, was decided. In that case a lessor had leased a café to a tenant and by the same deed granted the tenant an option to purchase the freehold reversion, which option was not registered as a land charge. When the lessor subsequently sold and conveyed the freehold reversion to a purchaser there was (following a not uncommon practice of conveyancers with regard to rack rent leases) no mention of the lease in the conveyance; neither was the option mentioned, possibly in reliance upon the tenant's having registered a land charge. The purchaser, however, had express notice of the lease and of the option and it was alleged that the tenant knew of the intended sale, although neither of these notices was really relevant. When the tenant later gave notice to the purchaser exercising the option the purchaser refused to sell, as the unregistered option was void against him; and in consequence the tenant gave the lessor notice purporting to exercise the option and then claimed damages from the lessor for breach of his covenant to convey.

In his judgment, Wynn-Parry, J., summarised the facts of the case and referred to the position before January 1, 1926, when equity would have intervened to decree specific performance against the defendant or, in the case of a transfer of the property, against any other person to whom the land had been transferred, other than a purchaser for value without notice. His Lordship referred also to the Land Charges Act, 1925, s. 10, and the Law of Property Act, 1925, ss. 198 and 199, which substituted registration for notice; and to the non-registration of the estate contract, as a result of which in that action the equitable remedy was gone; but stated that if at the time of the exercise of the option the lessor was still bound by the contract he would be liable in damages because he had put it out of his power to perform the contract. The judgment continued that much stronger language than the interpretation clause in the lease would have been required to bring about the result that on parting with the reversion the lessor ceased to be a party bound by the contract, and following *Stuart* v. *Joy*, *supra*, held that the lessor remained liable at common law after the sale of the reversion. His Lordship concluded, "It cannot be said that a purchaser of the reversion is to be held to have accepted at law the burden of the contract merely by taking a conveyance of the property with knowledge of the terms of the lease. To bring about such a position would require novation, and novation could not be brought about in those circumstances. But, if the original lessor does not take steps to see that his purchaser is bound at law to perform the contract in his place or pay damages for his default, why should the original lessor be regarded at law as free of his contractual bargain? It appears to me that unless the original lessor effectively assigns the burden of the contract so that the tenant has the obligation of the purchaser of the reversion in substitution of the original lessor's obligation, then the case is one in which the context does not merely admit, but forbids, the term 'lessor' to include anyone other than the original lessor, in this case the defendant".

With regard to the measure of damages, it was not pressed on behalf of the lessor that the principle of *Bain* v. *Fothergill* (1874), 43 L. J. Ex. 243; L. R. 7 H. L. 158 (under which where the vendor is unable to complete the conveyance owing to a defect in his title and is not personally at fault, the purchaser is limited to the recovery of his deposit and of the expenses incurred by him in investigating the title) applied, but in any event it was held that this principle was excluded, following *Goffin* v. *Houlder* (1920), 90 L. J. Ch. 488, in which Eve, J., had stated, " It is true that the defendant cannot convey, and she cannot convey because she has no longer any title to the property, but her inability is not caused by any inherent defect or infirmity of title which she cannot overcome and for which she is not responsible, but is due to the fact that, having concluded a contract for sale to Mr. Brice, she continued thereafter to offer the same property for sale to the plaintiff. The defendant by her own act had put it out of her power to carry out the offer when the plaintiff accepted it, and I see no grounds for applying the principles underlying *Bain* v. *Fothergill* to circumstances such as exist here. In my opinion the defendant is liable to compensate the plaintiff for the damages she has sustained consequent on the defendant's voluntarily creating a state of circumstances in which she is unable to give the plaintiff what she offered to give her ".

Judgment in the action *Wright* v. *Dean* was accordingly given for the plaintiff-tenant for damages and costs. We may here consider further the position of the lessor as defendant in that action. Until the purchaser refused to convey, the lessor had no notion that the tenant had not registered the land charge. If the option had been registered the tenant could have enforced the option against the purchaser, and how was the lessor in practice to know that the option had not been registered? Registration is notice to the whole world; is it a corollary that non-registration is notice to the whole world that registration has not been effected? Is it incumbent upon a vendor in the lessor's position to search against himself before completion of the sale and (if he find that a land charge in respect of the subject-matter of which is liable *in personam* has not been registered) to register it against himself?

The official form L.C.4, which is appropriate for the registration of land charges, is designed for registration on behalf of one person who is not the estate owner against another person who is the estate owner. It is, however, understood from the Land Charges Superintendent that an application by an estate owner for registration of a land charge against himself " on behalf of the tenant would be accepted, providing the application is lodged by a practising solicitor and duly signed by him "; and in this connection it may be remembered that the duties of the Land Charges Superintendent are administrative only. There is no procedural objection, therefore, to the registration of a land charge by an estate owner against himself, and it is apprehended that there may be other circumstances in which it may be advisable; examples are given below.

Before 1926, a vendor in the lessor's position could have protected himself so far as equity was concerned by giving notice to the purchaser. It may not be entirely irrelevant to suggest that as before 1926 such a vendor ought to have given notice to the purchaser in respect of the

option, it is the vendor who ought now to take the step which is substituted for notice, namely, to register the land charge. In any event, it would be wise of him to see that it is registered before the sale, particularly as, after Wynn-Parry, J., had decided the preliminary question of liability in *Wright* v. *Dean*, his Lordship indicated that although he had not so stated specifically in his judgment it was his view that there was no obligation imposed upon the tenant to register the land charge. It was not suggested that there was a duty imposed upon the lessor to register against himself, but the judgment seems to have been founded upon the fact that the lessor had put it out of his power to comply with his covenant, and that he could have protected the interests of the tenant by inserting an appropriate covenant in the conveyance to the purchaser.

The normal practice of conveyancers is to make such a covenant by the purchaser with the lessor, by way of indemnity only, to observe and perform the original covenant. This, however, would not have released the lessor from his liability, nor would it have enabled the tenant to sue the purchaser directly. Nothing that the lessor could have transacted with a third party could have decreased the rights of the tenant. Reference was made by Wynn-Parry, J., to novation, which would, of course, have required the consent of the tenant, as the effect would be that by mutual consent the contract between the lessor and the tenant would be rescinded and a new contract between the tenant and the purchaser substituted. It seems that without the joinder of the tenant nothing inserted in the conveyance could have been more than a separate and subsequent contract that the purchaser would indemnify the lessor. Accordingly, the way in which the lessor could best have preserved the interests of the tenant (and thereby have avoided a claim for damages being enforced against the lessor) would have been to ensure that the land charge was registered before the completion of the sale. And this could only have been done by searching against himself, and—if he had found that the land charge was not registered—effecting the registration. So far as the writer is aware, such a step on the part of a vendor is quite without precedent.

It is proposed, in conclusion, to consider the principle involved, in its application to other land charges. If, for instance, A mortgages to B for £x and subject thereto to C for £y and then A sells the land (subject to the mortgages) to D, A will have to search against himself before completion; as if C has not registered his puisne mortgage A will have to pay £y twice, once by deduction on the sale to D and again subsequently when C discovers his omission to register. This would be so even though express notice were given to D of the mortgage to C and to C of the sale to D—and apparently it would be the same even if C had a legal mortgage. A would in the normal course take an indemnity in the conveyance to D, but this would be worthless if D, being a man of straw, should re-sell without himself taking an indemnity.

Again, if M sells a house to N and imposes a restrictive covenant by N, and M omits to register it, when N sells he must ensure by search (and if necessary by registration) that the restrictive covenant is entered on the register as a D (ii) land charge. It is appreciated that by doing so N will not relieve himself of the liability under the covenant

at common law, but how much greater will the liability be if it is certain that M can never enforce the covenant against the owner of the land!

It appears that there must be either an alteration in the ordinary practice of conveyancers, or a statutory amendment of the law.

NOTES OF RECENT CASES

1. *PROPERTY AND CONVEYANCING CASES*

Contract for sale—specific performance—vendor's ability to compel assurance.—Elliott v. *Pierson,* [1948] 1 All E. R. 939 deals with (i) the description necessary to support a contract and (ii) the position of a vendor who has not at contract the whole estate. Here a document contained an option to purchase " such business lock stock and barrel " after referring to the freehold of Hilden Manor Road House and Country Club. Harman, J., held that this was a sufficient description for the purposes of the Law of Property Act, 1925, s. 40, and the Sale of Goods Act, 1893, s. 4, for a sale of the fee simple of the property and all the assets (less liabilities) of the business conducted there. The words " lock stock and barrel " did not include any assets physically on the premises which were not devoted to the purposes of the business.

The freehold was not, in fact, vested in the vendor but in a company of which the vendor and his nominee held all the shares. The vendor simply was a lessee of a substantial lease but from his position *vis-a-vis* the company could in fact compel it to convey the fee simple. Harman, J., held that the purchaser could not repudiate the contract, following *Re Hailes and Hutchinson's Cont.,* [1920] 1 Ch. 233. The judgment on this point is of interest, however, because the learned Judge discusses the question raised in *Hackett* v. *Dudley,* [1907] 1 Ch. 590, whether specific performance or damages can be awarded where the vendor has no interest in the property at the date of the contract, though he is able to convey by the date of completion. This case was criticised in *Williams' Vendor and Purchaser* (4th ed., p. 205), but Harman, J., took the view that the criticism was not well founded. This point was not necessary to the decision because the learned Judge also held that any repudiation based on want of title at the date of contract must be taken forthwith and the contract must not be treated as subsisting, as, for example, by requiring the legal estate to be got in by the vendor.

Trust for sale—power to invest in land.—Re Wellsted's Will Trusts, [1948] 2 All E. R. 209, if the decision is not reversed, is likely to provide some trouble for conveyancers. The short facts were that trustees for sale had in hand land, and the proceeds of sale of land, and it was proposed to sell some land and to invest the proceeds of that and earlier sales in land. Vaisey, J., in a very careful judgment held that the proceeds of sale of land could not, by virtue of section 28 of the Law of Property Act, 1925, be *invested* in land though they could be used for purchases of land for " the preservation or protection of the unsold land or for its improvement ": at p. 215. " When the trustees are trustees with money to invest they are no longer trustees with land to sell and are outside the section altogether so far as that money is concerned ": *ibid.* The judgment is an elaborate consideration of the various relevant sections in the Settled Land Act, and the Law of Property Act and it is impossible in a brief note to do justice to the

learned Judge's reasoning, but it may be observed that the decision is consistent with that in *Re Wakeman*, [1945] Ch. 177, and the learned Judge found some support for his view in *Re Kempthorne*, [1930] 1 Ch. 268, and *Re Stimpson's Trusts*, [1931] 2 Ch. 77 on the effect of the statutory trust for sale.

The vital issue turns upon the effect in section 28 (1) which provides that " trustees for sale shall, in relation to the land . . . and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925 . . . and (subject to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorised by the Settled Land Act, 1925, be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale. All land acquired under this subsection shall be conveyed to the trustees on trust for sale . . .". One point does not seem to have been dealt with, although it was carefully pointed out that the investment of capital moneys under the Settled Land Act, does not seem to be either a power of the tenant for life (since he does not invest), or the trustees (since they invest but do not select the investment). This point is that the subsection (as we have set it out) deals with three separate points: (i) the powers of a tenant for life, etc., in respect of land *and* proceeds of sale; (ii) the application of capital money *if and when* those powers are exercised; and (iii) the form that conveyances of land must take notwithstanding the fact that it is acquired under a settled land power. In our view, head (ii) does not arise in connection with a sale by trustees for sale since they are clearly acting not under settled land powers but under the trust for sale; whereas head (ii) only arises in connection with the settled land powers. Turning to head (i) it might be shortly argued (as indeed was pointed out by the learned Judge at p. 215) that " powers " do not include investment and this point would be stronger had only the powers of the tenant for life been referred to, since investment is not within Part II of the Settled Land Act. But the powers of the trustees of the settlement are dotted about the Act and, therefore, the powers must be wider than those conferred in Part II; indeed, specifically they include powers of leasing and management during a minority; whether or not there is a minority: *Re Gray*, [1927] 1 Ch. 242. Having regard to *Re Wakeman* (*supra*) and *Re Wellsted's Will Trusts* (*supra*), it would now appear that with regard to the proceeds of sale, the trustees have no powers under the Settled Land Act except in so far as these proceeds of sale are employed in connection with the land remaining unsold, *e.g.*, by way of loans for carrying out improvements.

The effect of these cases should be to add to all well drawn trusts for sale an additional clause giving the trustees power to purchase land for investment and, having regard to *Re Power's Will Trusts*, [1947] Ch. 572 (noted *ante*, Vol. 12, p. 142), enabling them to purchase for residence of beneficiaries as well as investment.

It is interesting to note that in the Town and Country Planning Act, 1947, section 73 of the Settled Land Act is declared to be applied to trusts for sale by section 28 of the Law of Property Act, 1925: see section 71 (4). The effect of *Re Wellsted* on this provision may produce interesting results.

Gift to a class—introduction of new members—perpetuity—Law of Property Act, s. 163.—*Re Hooper's Settlement*, [1948] 2 All E.R. 263, like *Re Lord's Settlement*, [1947] 2 All E. R. 685 (noted *ante*, Vol. 12, p. 220) which it followed, does not really provide any new law, but interesting illustrations of the difficulties surrounding class gifts. A settlor

provided *inter vivos* for such of his children as should attain twenty-five, provided that if any son died before attaining twenty-five leaving a child or children surviving who attained twenty-one, such children should take the share the deceased son would have had if he had attained twenty-five. Jenkins, J., held that the gift to the children would have failed for perpetuity but for section 163 which reduced the age of the children to twenty-one. This was due to the fact that the settlor might have had a child born after the settlement who attained twenty-five more than twenty-one years after the settlor's death and since it was a class gift the possibility of any member attaining a vested interest outside the period rendered the whole gift void: *Pearks* v. *Moseley* (1880), 5 App. Cas. 714. The learned Judge then held that as a matter of construction the proviso introduced into the class new members, namely, the grandchildren of any child who died before attaining a vested interest. Since such grandchildren might attain twenty-one more than twenty-one years after the settlor's death, and since they were members of the class, the whole gift failed. Section 163 of the Law of Property Act could not save the gift because it was not the age of vesting beyond twenty-one that rendered the gift invalid in this case.

It should be emphasised that this decision depends upon the construction put by the learned Judge upon the particular clause. If the proviso had been held to be by way of " substitution ", then the gift by way of substitution would have been bad but the gift to the original class would have been good, only those children who attained a vested interest taking a share of the whole fund.

(2 K. & E., p. 890 n. (*o*), p. 1048.)

Joint tenancy—severance by dealings.—Attention should perhaps be drawn to *Re Denny*, [1947] L. J. R. 1029, although the case concerned only personalty. Here three sisters took an interest under a will as joint tenants only part of which fell into immediate possession. By the time the residue fell into possession two sisters were dead, but Jenkins, J., held that by the method by which the sisters had received and treated the income of the interest in possession they had shown an intention to sever and had, therefore, severed their shares and, consequently, the *pro accrescendi* did not apply. It must be borne in mind that this intention to sever operating as severance would seem to apply also, so far as the beneficial interest is concerned, to interests in realty.

Animals—protection of property—shooting to kill—property in homing pigeons.—Sirl v. *Cresswell*, [1948] K.B. 241 has been applied in *Hamps* v. *Darby*, [1948] 2 All E. R. 474, which also held that homing pigeons are the property of the owner sufficient to sustain an action of trespass to goods even when they are away from home and devouring the peas of the landowner. The test is whether or not there is an *animus revertendi*. It is not necessary to pursue the learned judgment of the learned Master of the Rolls on this point and necessary only to observe that presumably it applies to any animal *ferœ naturæ* that has been trained to have an *animus revertendi*.

The defendant was held liable by the majority of the Court of Appeal (Greene, M.R., and Evershed, L.J., in a single judgment) for shooting the pigeons while engaged in eating his peas, primarily because they were not prepared to reverse the ruling of the learned County Court Judge who tried the case. The farmer had failed to establish that there was no practicable

means of stopping the destruction without shooting the birds or in the alternative that he had acted reasonably in regarding such shooting as necessary to protect his crops: *Cresswell* v. *Sirl* (*supra*), *per* Scott, L.J. On this point it is, however, necessary also to read the judgment of Wrottesley, L.J., although the learned Lord Justice did not dissent from the leading judgment, as it was an appeal from the County Court Judge whose decision is final on questions of fact unless no reasonable man could have come to such a conclusion. Having reviewed the evidence with robust common sense, the learned Lord Justice concluded his judgment (at p. 482) with these words: "those propositions (in *Cresswell* v. *Sirl*) must, I think, be applied reasonably, especially bearing in mind where the burden of proof is laid. For instance, the burden of establishing the negative proposition that there was no practicable means of saving the stock or crops under attack except by shooting (that is, to kill) may become a very difficult or even impossible burden to discharge. Strictly, all the farmer can usually say is: 'I could not think on the spur of the moment of any alternative that was likely to be effective'. Beyond that, all is likely to be surmise. Farmers cannot, I think, be called on to stand and watch their stocks or crops being destroyed while they endeavour to calculate the possibilities which may be put to them at a trial on behalf of the owner of the marauding dog or pigeon". We think that this view goes further than that of the learned Master of the Rolls and Evershed, L.J., although they are careful to point out (at p. 481) that another Judge might have come to a different conclusion. It seems desirable that more guidance should be afforded on the nature of this proposition of "practicable means" or "reasonable action".

---

2. *CHARITIES*

"God's work"—religious purposes.—In a will containing a number of gifts some were made for "God's work", but coupled with these were gifts to churches. The question was whether this was a gift for religious purposes: *Re Barker's Will Trusts*, 64 T. L. R. 273. Jenkins, J., held that although in one sense everything was "God's work" since He created the universe, nevertheless from the context the meaning was more limited. He held that the testatrix meant the promotion of religion primarily, though not exclusively, through the medium of the Baptist Church and, following *Re Darling*, [1896] 1 Ch. 50, where the gift was for "the service of God", that this was a gift for religious purposes and, therefore, charitable.

Cessation of particular charity prior to date of gift—funds of charity applied under a scheme—failure of gift.—*Re Lucas*, [1948] Ch. 175 (noted *ante*, Vol. 12, p. 221) has been reversed on appeal. Here the testatrix gave an endowment to a cripples' home by name and address, but before her death the home had been closed and its funds were applied under a scheme. There was no evidence that the testatrix knew of these events or whether or not she would have altered her will and Roxburgh, J., held that the gift failed. The ground of this decision was that a gift to a particular charity which has wholly failed will lapse unless there is a general charitable intention, which did not arise in this case: *Re Rymer*, [1895] 1 Ch. 19. On the other hand it has been held that so long as there are funds in

existence of a charity, changes in its constitution do not constitute a cessation of existence: *Re Faraker,* [1912] 2 Ch. 488. This being the position it was a question of construction whether the gift was for the restricted purposes of the particular home or for the purposes generally of the trust deed under which the home was maintained. Lord Greene, M.R., reading a judgment of the Court held that the latter construction was correct and that in these circumstances the gift did not fail and that the sum was payable to the official trustee for the charity.

It is important to observe that the decision turned as a matter of construction upon whether or not the gift was intended to benefit a particular institution, in this case the particular home named in the will, or the trust as a whole which, of course, subsisted independently of the home.

---

3. *WILL CASES*

By J. G. Fleming, M.A., of Lincoln's Inn, Barrister-at-Law

Division per stirpes or per capita—family distribution—beneficiaries of same generation—description nominatim.—Re Hall (1948), 64 T. L. R. 243, and *Re Jeffrey,* [1948] 2 All E. R. 131, raise the familiar question whether *per capita* or *per stirpes* distribution was intended by words of division in the disposal of residue. In the first case the testatrix directed the remainder of her estate "to be divided equally between my youngest sister May, and my niece Irene and her children". Harman, J., conceded that the *prima facie* rule should be *per capita,* but held that it was displaced by context, primarily by virtue of the comma which appeared to express the intention of dividing the estate into two moieties, but also because "cases of capital distribution are not generally cases of family distribution", whereas in respect of the latter category the stirpital basis was more appropriate and therefore presumably intended. It is true that the *prima facie* rule of construction is easily displaced by particular context or particular circumstances. The fact that the division is between a stranger and members of the testator's family favours stirpital distribution: *Re Cossentine,* [1933] Ch. 119, *Re Alcock,* [1945] Ch. 264, 269; *semble,* also, where the estate is to be shared between members of the same family not all of the same generation, particularly, one might add, where one set of beneficiaries has a common ancestor who is of the same generation as the other beneficiary or beneficiaries, as in *Re Walbran,* [1906] 1 Ch. 64, *Re Prosser,* [1929] W. N. 85, and in the instant case. This criterion furnishes a distinction between *Re Walbran* and *Re Alcock,* in which case the residue was divisible between a nephew and the three children of a cousin, all being of the same generation. It is not, however, necessarily decisive, as shown by the contrary conclusion reached in *Re Harper,* [1933] Ch. 119. Some of the cases are not easy to reconcile, but caution is advisable against placing undue reliance on *Re Walbran,* where Joyce, J., seemed of the opinion that the use of the word "between" justified the presumption that the estate was intended to be divided into two moieties. This etymological interpretation has since been rejected and the modern tendency strongly favours *per capita* distribution. Mr. Justice Harman's proposition that a clear distinction exists between cases of family distribution and others is not supported by previous authority, except in the limited sense indicated, but his conclusion on the facts can be satisfactorily explained by reference to the comma

dividing the two groups of beneficiaries. All the same his point of view does not lack attraction. Its acceptance would undoubtedly contribute towards simplification and lead to conclusions which most probably correspond more closely to testators' intentions than the general *per capita* construction. The strong leaning of the Court towards achieving equality between different branches of a family, which was recently reiterated by Lord Simonds in *Miller* v. *Gerrard,* [1947] A. C. 461, 476, furnishes a rationale which would also favour stirpital distribution in cases of family gifts.

In *Re Jeffrey* the gift was " to my brothers Reginald and Alfred S.–J. also Guy and Ellaline S.–J. equally ", the last-mentioned being children of a deceased brother. It will be noticed that the controversial term " between " had not been used in this home-made will, and Roxburgh, J., considered that the word " also " had been inserted not to divide the residue into two moieties, but to differentiate the last two persons from those who were described as brothers. The instant gift designated all beneficiaries *nominatim* so that, in view of there not being a single precedent for stirpital distribution in such a case, the *prima facie* rule of distribution *per capita* was not displaced. No weight was attributed to the fact that this was a case of family division.

(Theobald 230, 231.)

Bequest " to the wife of my grandson "—two persons answering description—presumption in favour of early vesting—absence of controlling context.—If two or more persons satisfy the description of " wife ", the one answering it at the date of the will is *prima facie* entitled to take: *Re Coley,* [1903] 2 Ch. 102. Where, however, such person existed but dies prior to the execution of a codicil republishing the earlier will, a second wife may qualify, even although she did not fall within that description at the time of the execution thereof: *Re Hardyman,* [1925] Ch. 287. In the absence of any such person either at the date of the will or at the testator's death, the primary canon of construction selects the *first* candidate answering the description on the principle that the Court favours early vesting in preference to contingency. This found a neat illustration in *Radford* v. *Willis* (1871), L. R. 7 Ch. App. 7, where the testator had given property upon trust for his daughters A and B equally for life and upon their respective deaths to their husbands in fee, with the proviso that, if either daughter died " unmarried ", her share should go to the survivor for life, remainder of the whole to the husband of the surviving daughter. Subsequently to the testator's death, A married, but her husband predeceased her, having by his will devised his interest in the property to his wife. She contracted to sell her moiety but the purchaser objected to her title. It was held that on her marriage the interest in remainder had vested indefeasibly in her husband with the result that, in the circumstances which happened, she could make title, even although she might conceivably marry again.

The same principle was applied by Harman, J., in *Re Hickman's Will Trusts,* [1948] 2 All E. R. 303. The testatrix by a codicil to her will executed in 1914 bequeathed her pearl necklace to her daughter-in-law " so that she may have the use and enjoyment thereof for life " and at her death (which occurred in 1946) to the wife of her grandson Alfred or in the event of his not marrying to her granddaughter. Alfred was not married either at the date of the codicil or at the death of the testatrix. His first marriage was dissolved, and in 1940 he married again. His divorced wife and his widow advanced a claim to the necklace. It was held that the description applied to the former, because the codicil

did not disclose a sufficiently cogent context to displace the presumption in favour of early vesting. It was forcibly argued that such context could be discerned in the fact that the subject-matter of the bequest was not an estate of inheritance, but an article for adornment and that it was consequently unlikely that the testatrix could have intended the necklace to be given to anyone but the person who would qualify when the first holder died. This contention was, however, neutralised by two considerations: first, it presupposed that the testatrix contemplated the series of events which did occur, this being a matter of speculation and not corroborated by the terms of the codicil, and secondly, the gift over militated against the suggested construction because the interest of the granddaughter was thereby defeated as soon as Alfred married. The primary canon of construction therefore applied.

(Theobald 208.)

One article answering description of two dispositions—latent ambiguity —admission of extrinsic evidence—inconsistency.—The decision in *Re Alexander's Will Trust,* [1948] 2 All E. R. 111, savours of Solomonic quality but is none the less (or perhaps on that account) a trifle unorthodox. The testatrix left by clause 19 of her will "my *five* row diamond bracelet" to X and by clause 31 "my diamond chain bracelet" to Y. At no time did she own more than one diamond bracelet which consisted of *eight* rows. Roxburgh, J., conceived the primary issue to be whether the existence of only one article answering the description of two legacies couched in different language gave rise to a latent ambiguity. This question he answered in the affirmative and therefore admitted evidence by a personal maid who deposed that the testatrix had been accustomed to refer to the article sometimes as "my *five* row bracelet", sometimes to "my chain bracelet", so that in effect she had in both clauses of her will referred to the same article of jewellery. This conclusion was, of course disappointing because the admission of extrinsic evidence failed to solve what the learned Judge regarded as an equivocation. Not unnaturally, the inquiry suggests itself whether this was a case of equivocation at all. An ambiguity normally arises where, on the construction of a will, words of description apply equally to *one of several* persons or things. In the instant case, the position was reversed in the sense that two things had been bequeathed and only one was available which might answer the description. Had the article been given in *identical* terms, there would have been an inconsistency, not an ambiguity. The feature *primae impressionis* in *Re Alexander* lay in the fact that the description had been framed in *different* language. If neither description fitted the available thing accurately, admission of extrinsic evidence might be commendable in order to prevent both gifts from failing for uncertainty. This solution, however, is not equally appropriate, one should have surmised, where one or two different descriptions accurately fitted the only available article. In the present case, the piece of jewellery clearly fell within the terms of clause 31 because it was in fact a "chain diamond bracelet", so that the Gordian knot might have been cut by holding that there was neither a latent ambiguity nor an inconsistency, and that it ought to go to Y.

Having reached the conclusion that there was an inconsistency, the learned Judge held that the old established but much criticised rule of thumb by which the later disposition prevails would operate unsatisfactorily in the circumstances of the case before him, because the typewritten disposition of the earlier clause 19 had been slightly altered

and initialled by the testatrix. This circumstance indicated the possibility, though it was no proof, that she had reconsidered the earlier clause at a later stage. Roxburgh, J., escaped from the dilemma by taking recourse, and applying for the first time, a dictum by Lord Brougham in *Sherratt* v. *Bentley* (1834), 2 My. & K. 149, to the effect that where the same thing is given first to A and then to B, unless it be some indivisible chattel, the two legatees might take a moiety. This was not inconsistent with the ancient rule derived from Lord Coke that a subsequent gift which is entirely and irreconcilably repugnant to a former disposition of the same thing, shall abrogate and revoke it. The bracelet being readily susceptible of division without impairing the value of each moiety, went to both claimants equally.

(Theobald, 100, 532.)

General or specific legacy—bequest of shares in private company—falsa demonstratio—method of satisfying legacy.—Re O'Connor's Will Trusts, [1948] 2 All E.R. 270 illustrates the strong leaning in favour of general legacies. The testator by clause 5 of his will bequeathed to his son 10,000 preference shares of £1 each in the capital of a private company. Clause 6 contained a number of pecuniary legacies, described as such, and by clause 8 the executor was directed, *inter alia,* to pay the "pecuniary legacies" out of the residuary estate. No other direction for the payment of legacies out of residue was given. At all material times the testator owned only 9,000 shares of that description. A legacy of stock is *prima facie* general, even if the testator had the exact amount of stock at the date of his will. This rule applies equally where the gift of shares is expressed in terms of pecuniary value, whether the sum happened to be round or even fractional: *Re Willcocks,* [1921] 2 Ch. 327. The presumption is almost insuperable where, as in the present case, the testator never held the exact number of shares which he bequeathed and had not designated them explicitly as his by the use of any possessive word such as "my". On the other hand, the case for the residuary legatees was strengthened by the circumstances that (a) the shares were in a private company of which the testator was manager and director, and in which the transfer of share capital was subject to the usual restrictions, and (b) the reference in clause 8 of the will to the payment of "pecuniary legacies" out of the residue seemed to refer exclusively to the legacies described as such in clause 6 and could not have been intended to include the bequest of the preference shares. In effect, therefore, no provision had been made either expressly or by implication for the satisfaction of the son's legacy. Roxburgh, J., felt constrained to reach this conclusion notwithstanding that by section 55 (1) (ix) of the A.E.A., 1925, the term "pecuniary legacy" is, for the purposes of the statute, defined so as to include a general legacy. He also conceded that, had the testator referred to 9,000 or less shares, there would have been sufficient context to construe the legacy as specific. As things were, however, the residuary legatees were forced to argue that the 10,000 was a *falsa demonstratio.* This weakness prevented the context from being sufficiently overwhelming to displace the very strong presumption that a general legacy is usually intended. By contrast, to attribute the stigma of a *falsa demonstratio* to the word "pecuniary" in clause 8 did less violence to the pronounced leaning of the Court in this matter.

Following the order made in *Robinson* v. *Addison* (1840), 2 Beav. 515, an inquiry was directed whether it was possible to obtain 1,000 preference shares in the company within twelve months from the testator's death, but if this should prove impossible, the legatee was entitled to such a sum as

at that date would have been required to purchase the shares, their value to be ascertained in accordance with the provisions in the articles of association regulating the elicitation of the price of shares on the footing of willing vendor and purchaser.

(Theobald, 114.)

Family provision—grant of administration—will subsequently found—time for application.—The quality of draftsmanship of the Inheritance (Family Provision) Act, 1938, has been the subject of adverse comment on several occasions. A new perplexing feature of that unsatisfactory piece of legislation was brought to light in *Re Bidie,* [1948] 1 All E. R. 885. In April, 1945, a full grant of administration was made in respect of the estate of a person who was assumed to have died intestate. The deceased had in fact executed a will in 1937 which contained no provision for the widow. On its discovery, the grant of administration was revoked, and in September, 1946, a grant of probate was made to the executor named therein. In January, 1947, the widow applied for an order to be made in her favour under the Inheritance Act, 1938, s. 2 (1) of which, however, restricts the period for submission of such application to " six months from the date on which representation in regard to the testator's estate for general purposes is first taken out ". The preliminary objection to the widow's application, that the statutory period of limitation had elapsed, was sustained by Jenkins, J., whose judgment elucidates the following points: (1) section 2 (1) contemplates the possibility of a succession of representations being taken out, the date of the first being the material one from which time runs against the applicant; (2) the representation for this purpose must have been made for general purposes, so that it presumably excludes a grant in respect of settled land or a grant *pendente lite*; (3) a grant of administration is a grant of representation in regard to the " testator's estate ". It is true that the last term implies a case of testate succession, but it is inconclusive in the present context and merely emphasises the fact that an applicant has no *locus standi* under the Act, unless the deceased had in fact made a will. The given estate is the " testator's " if it is the estate of a person who died in the circumstances defined by section 1. The expression does not impinge upon, or curtail, the meaning of " grant of representation ". (4) The only conceivable alternative would have been that time ran from the first grant of probate or letters of administration *cum testamento annexo* in respect of the will which was before the Court in a given application under the Act. That conclusion, however, is not permissible because in the case of a later second will being subsequently found, the date of grant of probate of an earlier will would clearly have been the material moment for the purpose of section 2 (1). The argument that time was intended to run only from the moment a dependant is first in the position to exercise his or her remedy so as to negative the relevance of a prior grant of administration, clearly proved too much because it would be equally appropriate to the case of successive grants of probate, where no reliance could be placed on the expression " in regard to the testator's estate " in order to preclude what was admittedly a most regrettable, but none the less unavoidable, conclusion.

(Theobald, 77.)

Money paid under mistake—right to refund—constructive trust—personal claim in equity—limitation of action—equitable property rights—tracing.—The extensive litigation caused by Caleb Diplock's residuary bequest, in which he directed his executors to apply the estate for "benevolent or charitable" objects, has assumed proportions which ensure its claim as one of the causes célebrès of this generation. The recent judgment of the Court of Appeal, [1948] 2 All E. R. 318, 429, has made a further substantial contribution to the elucidation of the principles of equitable jurisdiction in matters of "unjustifiable enrichment". The claims of the next-of-kin to obtain a refund of the sums which had been variously paid by the executors to some 139 institutions on the mistaken assumption of the validity of the residuary clause, proceeded on the twofold footing that the recipients were personally liable to *repay* the donations and could alternatively be compelled to make *restitution*.

The claims *in personam* were expressed under two distinct heads:

(1) While it was conceded that from the date of receipt of the warning letter notifying the institutions of the plaintiffs' challenge they must be taken to have been affected with knowledge of the adverse claims so as to make them accountable in respect of any balance which still remained in their hands, the Court of Appeal, following Wynn-Parry, J., refused to attribute to them the character of constructive trustees as from the date of the original receipt of the sums paid to them by the executors which they had accepted in the bona fide belief that they were entitled to them. In the circumstances the principle of constructive notice which had been evolved in relation to defects in title of land, could not be extended in order to burden them with the obligations of trusteeship solely by virtue of the fact that the donations had been accompanied by a paraphrase of the testator's will which contained the essential vice of the original in its use of the distinctive formula. It may be added that Equity has hitherto hesitated in making a stranger a constructive trustee in the narrow sense, unless he has dealt with the trust property in a manner inconsistent with the trusts of which he was actually cognisant, and that a previous attempt to invoke the doctrine of constructive notice in relation to title of pure personal property was rejected in *Joseph* v. *Lyons* (1884), 15 Q. B. D. 280. Cf. *Coleman* v. *Bucks and Oxon Union Bank* (1897), 2 Ch. 243.

(2) It will be recalled that Wynn-Parry, J., had also repudiated the existence of an equitable claim *in personam* by an unpaid beneficiary against the wrongly-paid recipient of the testator's money transcending the limits of the analogous common law action for money had and received, with the result that the plaintiffs had failed by reason of the circumstance that the executors had made the payments upon a mistaken interpretation of a will, *i.e.*, under a mistake of law. The learned Judge had deduced from the limited number of cases cited to him that no direct action against the wrongful recipient could lie unless (a) the mistake actuating the executors was a mistake of fact and (b) there had been an administration by the Court. It is true that those two elements were invariably present in the quoted precedents, but in none except *Hilliard* v. *Fulford* (1876), 4 Ch. D. 389, and *Re Hatch*, [1919] 1 Ch. 351, was there any intimation that they were essential. In certain decisions, like *Re Robinson*, [1911] 1 Ch. 502, *Re Mason*, [1929] 1 Ch. 1, and *Re Blake*, [1932] 1 Ch. 54, it had been held, however, that the period of limitation applicable to such actions was the same as that appropriate to common law actions for money had and received, which seemed to lend colour to the view that the two remedies must be treated as analogous for all purposes, irrespective altogether of the existence of certain distinguishing features, such as that the equitable action could be brought by claimants other than the person who had made the mistaken payment and who were not, therefore,

responsible for the occurence and nature of the mistake committed by the third party, except where, as in *Rogers* v. *Ingham* (1876), 3 Ch. D, 351, the payment had been made with their assent.

As tentatively indicated in a previous comment (11 Conv. (N.S.) 275), this view of the authorities was too narrow and paid insufficient attention to decision stretching back to Lord Keeper Bridgman by which the unpaid or underpaid legatee's right to a refund had been defined upon a more generous footing. In the case of a miscalculation of assets or wrongful payment, the executor is, of course, primarily liable for the loss, provided the payment was voluntary and not by compulsion of the Court. Payment of a legacy by itself constitutes an admission of assets, whether there was a sufficiency or not: *Orr* v. *Kaines* (1750), 2 Ves. Sen. 194. Conversely, an executor who has voluntarily paid a legacy cannot call upon the legatee to refund, if the assets afterwards prove insufficient to pay other legacies of higher or even order: *Newman* v. *Barton* (1690), 2 Vern. 205, *Orr* v. *Kaines,* or if debts emerge of which the executor had notice at the time of payment: *Jervis* v. *Wolferstan* (1874), L. R. 18 Eq. 18, *Whittaker* v. *Kershaw* (1890), 45 Ch. D. 320. A creditor has the right of demanding repayment from beneficiaries: *Anon* (1683), 1 Vern. 162, *Newman* v. *Barton,* now section 32 (2), A. E. A., 1925, and has the additional proprietary remedy of tracing the assets into their hands: see section 38 (1), A. E. A., 1925. The unpaid or underpaid legatee's or next-of-kin's primary remedy lies against the executor, and it is only if there is "no other way" (*Orr* v. *Kaines*) to obtain redress, as *e.g.,* where the latter is insolvent or free from liability, that a direct personal claim can be advanced against an overpaid or wrongly paid person who was mistakenly assumed to have been entitled to the money. The right of a legatee of higher or even order to demand repayment or adjustment from a legatee who has been fully paid, is further limited to cases where there was an insufficiency of assets at the time of payment, because if the deficiency occurred subsequently, the satisfaction of the legacy was not a *devastavit* and the claimant's remedy is barred on the principle *vigilantibus, non dormientibus aequitas subvenit*: *Walcott* v. *Hall* (1788), 2 Bro. C. C. 305, *Fenwick* v. *Clarke* (1862), 4 De G. F. & J. 240, *Peterson* v. *Peterson* (1866), L. R. 3 Eq. 111. The last limitation does not of course apply to a case where the recipient has no right to the money at all, as, *e.g.,* where he was paid on the mistaken assumption that he was entitled as next-of-kin, because the failure to obtain a refund in cases like *Walcott* v. *Hall* is based on the principle that the first paid legatee got no more than he was entitled to. The unpaid beneficiary's right of proceeding directly against the recipient is not subjectively conditioned by the nature of the mistake of which the executor was guilty, and the reports do not for the most part indicate the reason why the wrongful payment was made. Nor is it qualified by the necessity of showing that there had been an administration by the Court. The equity is, subject to what has been said above, equally available to an unpaid or underpaid creditor, legatee or next-of-kin. It is true that there existed no precedent in which such an action had been brought by persons entitled on intestacy against those in whose favour distribution had been made as beneficiaries supposedly entitled under a will, but *David* v. *Frowd* (1833), 1 My. & K. 200, demonstrated that it would lie at the suit of a sole next-of-kin of an intestate against defendants to whom, by order of the Court, payment had been made on the assumption that they were themselves entitled. The Court of Appeal, in the instant case, rejected the argument that a refund could be demanded only where the recipient must be taken to have accepted payment with the knowledge that his title may be defeasible in favour of other interested persons. Thus it had been contended that every beneficiary must be aware that he takes subject to the rights of creditors, every

residuary legatee subject to legacies of higher or even order, and every next-of-kin subject to the rights of other relatives of equal or nearer degree; but that the recipient's conscience was not affected in a case like the present where they accepted the payments in their assumed capacity as residuary legatees and could not have anticipated taking subject to the right of the next-of-kin. On the correct view of the authorities, the conscience of a defendant is objectively affected if, at the time of payment, he received more than he was properly entitled to, and it makes no difference whether he had in fact a limited right to the estate or not, though the effect of the refund in the latter case will be to dispossess him altogether rather than to produce equality between him and the other claimants.

As a consequence of the principle suggested in *Orr* v. *Kaines* that a direct refund can be demanded by an unpaid legatee only in the last resort where no action could be successfully prosecuted against the executor, it followed that the plaintiffs' claim against the institutions must be limited to the amount which they could not recover from the persons primarily responsible for the error, because the justification of the equitable right to a refund lies in the absence or exhaustion of the beneficiary's right to obtain redress from the wrongdoing executors. The sums recovered from them by virtue of a judicially approved compromise were to be rateably credited to all the institutions in question who were, therefore, only liable for the balance of the payments which they had received.

The actions *in personam* against the defendants were " in respect of " claims to personal estate of a deceased person within section 20 of the Limitation Act, 1939, and thus not barred until the lapse of twelve years from the date when the right to receive the interest accrued. That section, unlike provisions of previous statutes, did not employ the formula " for the recovery of " which had been held to apply solely to claims against personal representatives and exclude the present type of action for a refund against other beneficiaries or assumed beneficiaries, in respect of which Equity had resorted to the analogous six years period of limitation applicable to common law actions for money had and received: *Re Robinson,* [1911] 1 Ch. 502, *Re Blake,* [1932] 1 Ch. 54. This conclusion was not defeated by the consideration that the new Act in effect increased the statutory period. The result was no doubt contrary to the general trend of legislation, but by no means isolated because claims by next-of-kin against an administrator which used to be barred after six years under section 8, Trustee Act, 1888, in consequence of the statutory trust for sale created by A. E. A., 1925, s. 33, are now equally subject to the twelve years period. The Court did not overlook the awkward consequence that time under section 20 begins to run from the date when the right to receive the interest accrued, i.e., without regard to the date when the wrongful payments had been accepted, whereas under section 2 (1) (a) which, in the defendants' submission was applicable to the present claim in analogy to a common law action founded on contract, the relevant date is the moment when the cause of action has arisen, which would have been more suitable to a claim of this kind.

Although the plaintiffs succeeded in their claim *in personam,* it became necessary to define their alternative and distinct right to follow the assets into the hands of the institutions, because in so far as tracing could be sustained, it would enable them to recover their money or specific investments into which they had been converted together with interest, whereas by contrast the defendants could not be charged for interest in respect of their personal obligation to repay the donations which they had improperly received: *Gittins* v. *Steele* (1818), 1 Swan. 199, Wynn-Parry, J., had reached the conclusion that the Common Law gave a remedy for the purpose of following property even in the absence of a fiduciary relationship on the

part of the recipient, but that the right ceased on "mixture" with sums belonging to the latter or a third party. Identification was not, however, lost by the mere fact that the money had been paid into a bank account. The Common Law proceeded on the basis that the unauthorised act was capable of ratification by the owner, and no distinction could be maintained between specific investments exclusively purchased by means of the principal's money and a chose in action *vis-à-vis* the banker. The institutions, therefore, had to disgorge those sums which they had paid into *separate* accounts to the extent of the remaining credit balance. The orders made pursuant to this decision were affirmed by the Court of Appeal.

The learned Judge had further held that Equity permitted tracing into mixed accounts, provided the mixing occurred in breach of trust or other fiduciary relationship and that the trustee was a party to the subsequent proceedings for restitution. But since the mixing, in the instant case, had been accomplished by volunteers, their conscience was not affected so as to preclude them from setting up an adverse title. This proposition was demolished by the Court of Appeal.

According to the principles enunciated by Lord Parker in his eminent judgment in *Sinclair* v. *Brougham,* [1914] A. C. 398, the owner of an equitable property right may trace his money into a mixed fund held by a volunteer, and it does not matter whether, as in *Sinclair* v. *Brougham,* the mixing was effected by the trustee or an innocent third party. Mr. Justice Wynn-Parry's conclusion had been based upon a mistaken interpretation of the legal situation in *Sinclair* v. *Brougham,* because in that case the directors had mixed moneys belonging to two classes of persons both of whom had equal equities, but the aggregate fund was, at the time of the proceedings, standing in the name, not of the trustee (directors), but of a volunteer recipient whose own moneys were partially represented therein. Nevertheless, the depositors who were *ultra vires* creditors were allowed to advance a proprietary claim against the society, although the actual mode of adjusting the competing interests did not give the former a priority, because the recipients were not precluded from asserting their own rights, in contrast to *Re Hallett* (1880), 13 Ch. D. 696, where the defendant was the unfaithful agent who could not by reason of his fiduciary position towards the claimants set up his breach of duty and assert any title at all in respect of the money which he had himself contributed. The special method of *applying* the equitable principle of tracing in *Re Hallett* was conditioned by the fiduciary character of the defendant, but does not impinge upon the existence of a tracing right as such, which is conceded to every owner of what Equity in effect regards as a property right. It is not a *genus* but a *species* of a wider equity which operates in different ways according to the circumstances. In some cases it results in a priority to the claimant where the defendant occupied a fiduciary position and mixed the owner's money with his own or where a third party either receives the conglomerate or mixes the "trust" money with his, knowing in either case that it was impressed with the rightful claims of a third person. Where, on the other hand, the contest is between two claimants to a mixed fund held either by a fiduciary agent, as in *Re Stenning,* [1895] 2 Ch. 433, or by one of the claimants who is an innocent volunteer, as in *Sinclair* v. *Brougham,* they share *pari passu.* In the former case, the fiduciary agent is estopped from setting up a claim to his own money by virtue of his trust relationship, but in the latter "the mutual recognition of one anothers rights is what Equity insists on as a condition of giving relief".

Mr. Justice Wynn-Parry's decision which negatived the right of tracing into a mixed account held by an innocent volunteer had in effect curtailed the efficacy of equitable rights by driving a wedge between their

enforceability against volunteers and trustees. The decisions of the House of Lords in *Sinclair* v. *Brougham* and of the Court of Appeal in *Re Diplock* have completed the process of the re-edification of equitable rights which found its first clear expression by Sir G. Jessel in *L. S. W.* v. *Gomm* (1882), 20 Ch. D. 562 and attained its apotheosis in *Re Nisbet and Potts' Contract,* [1906] 1 Ch. 386, where it was established that an equitable claim could be enforced against a volunteer whose conscience could in no way be debited with knowledge, actual or constructive, of the existence of an adverse claim and who did not set up his legal title derivatively from a person standing in a fiduciary position towards the party asserting the equitable right. The conception of conscience had lost its personal element and become a useful formula as an *ex post facto* justification whenever in any given set of circumstances a defendant is prevented from setting up a title adversely to a person's claim which the Court of Equity deems deserving of protection. Thus, in the inimitable words of Lord Parker, " starting from a personal equity, based on the consideration that it would be unconscionable for anyone who could not plead purchase for value without notice to retain an advantage derived from the misapplication of trust money, it ended, as was so often the case, in creating what was in effect rights of property, though not recognised as such by the common law " ([1914] A. C. 441–442). This evolution has not, however, led to an identification of legal and equitable rights, because the latter do not avail against a purchaser of the legal title for valuable consideration, so that tracing against a banker in respect of moneys paid by a customer into an overdrawn account cannot succeed, provided the defendant was unaware of the adverse equitable right: *Thompson* v. *Clydesdale Bank,* [1893] A. C. 282. Yet it would be short-sighted to overlook the significance of the development from personal to proprietory rights in Equity which almost appeared forestalled when Lord Northington repudiated the unorthodox conclusions of Lord Mansfield in *Burgess* v. *Wheate* (1759), 1 Eden 177, but which was at last acknowledged in forthright spirit by the House of Lords in *Baker* v. *Archer-Shee,* [1927] A. C. 844. It is submitted that the decision in *Re Diplock* is an additional pillar in the edifice of modern equity which would have been regarded with astonishment by the mediæval progenitors of the Use.

In applying the foregoing principles to the case in hand, the Court of Appeal refused to accede to Lord Dunedin's wide proposition that the remedy of tracing was available whenever a superfluity is found to exist: [1914] A. C. 398, 437. Not only is that remedy dependent upon the existence of an equitable property right, but its efficacy cannot reach beyond the actual or notional identification of the property or its proceeds, or to a case where its enforcement would produce an inequitable result. Equity had gone far in *Sinclair* v. *Brougham* to allow a tracing order in favour of a *class* beyond the verge of actual identification where, after a process of exclusion, only two groups of claimants of equal standing remained. The Court of Appeal, however, refused to compel restitution from those institutions which had employed Diplock money in order to build on land or improve buildings which already belonged to them. Two reasons were proferred to justify this conclusion: First, the money may have disappeared altogether in such a case because the alteration may have been undertaken in order to fit the house better to the personal needs of its owner without increasing its objective value; and secondly, it would be inequitable to compel the innocent volunteer to take his *pro rata* share by way of a charge for the value of the land when in fact he had contributed the land itself, presumably because " Equity intervenes, not to do what might be thought to be absolute justice to a claimant, but to prevent a defendant from acting in an unconscionable manner.

Equity will not restrain a defendant from asserting a claim save to the extent that it would be unconscionable for him to do so" (at p. 353). It may be respectfully suggested that of the two reasons, the latter is distinctly preferable, because were the former to be given exclusive weight, it would compel the conclusion that the remedy of tracing would have to be denied in those circumstances even against a guilty trustee, since its premise, *i.e.*, impossibility of identification, is equally applicable to both cases.

The Court also denied the right of following Diplock money employed to discharge unsecured and secured debts; in the latter case because the effect of re-opening the mortgage would lead to an inequitable adjustment since the institution which had contributed the land would again have to be satisfied with a mere charge. In respect of moneys paid into a current account, the rule in *Clayton's Case* was held to apply so as to attribute withdrawals to the chronological order of payments in. In the analogous situation of *Sinclair* v. *Brougham* it had been decided that, not only were the shareholders and depositors entitled to share *pari passu,* but the depreciation had to be borne rateably between them because individual items could not be traced in the literal sense. The Court of Appeal in the instant case refused to accede to the argument that because both claimants were on principle entitled *pari passu,* withdrawals out of the mixed account ought to be attributed rateably to their respective interests. It is true that in case of subsequent withdrawals from a bank account standing in the name of a fiduciary agent, the rule in *Clayton's Case* had been invoked in *Re Stenning* in order to determine the incidence of loss as between two sets of beneficiaries, but North, J., had on that occasion purported to follow Fry, J., in *Re Hallett* (1880), 13 Ch. D. 696, 704, without apparently appreciating that the learned Judge had felt unable to follow his own inclination and depart from the decision of the Court of Appeal in Chancery which in *Pennell* v. *Deffell* had laid down that the rule in *Clayton's Case* was applicable even on the question of withdrawals against a trustee. Thus, when the Court of Appeal in *Re Hallett* had overruled the earlier precedent of the Court of co-ordinate jurisdiction, the basis of Mr. Justice Fry's conclusion on the ancillary issue of the adjustment of claims as between the two beneficiaries had equally disappeared, and neither Jessel, M.R., nor Baggallay, L.J., purported to sustain it (the point having lost all importance on the facts in view of their decision on the main issue). It is, indeed, difficult to comprehend why the rule in *Clayton's Case* which provides a perfectly reasonable solution for determining questions of appropriation as between banker and customer, should be accorded equal authority in settling the incidence of depreciation of a fund in a bank account claimed by two *cestuis que trust,* and it is not without significance that a considerable body of case law in the United States stands for the contrary conclusion: *Scott on Trusts* (vol. 3, § 519). In the instant case, the rule in *Clayton's Case* was, however, held inapplicable to the sale of some uncertified war stock from a larger mixed fund which partially represented Diplock money, and the claim for a rateable proportion of the remainder was sustained.

One further aspect of the judgment calls for brief comment. The Court intimated that, subject to discussion, the sums recovered from the executors ought to be credited rateably to the charities for the purpose of both the claims *in personam* and *in rem.* This suggestion seems *prima facie* to come perilously near a confusion between the two respective rights. The equity of tracing presupposes a proprietary right over assets which the owner can identify. Can it be maintained that a right *in rem* is curtailed by the existence, and to the extent, of a right *in personam* which the owner may be in a position to exercise against the holder of

his property or a third party who is implicated in the conversion? It is conceded that the charities' obligation to refund was limited by the *primary* liability of the executors to make good the loss: *Orr* v. *Kaines*, but it can hardly be supposed that the plaintiffs' right to secure restitution of their own property is *secondary* to, and cut down to the extent of, their co-extensive remedy against the executors. What Lord Greene, M.R., must have had in mind was that, because the claimants had already enforced the latter right under the compromise order, they had to restrict their proprietary claim to the balance.

---

4. *FAMILY LAW CASES*

By R. H. GRAVESON, Ph.D., S.J.D., LL.M., of Gray's Inn, Barrister-at-Law

Nullity of marriage—wilful refusal to consummate—Grimes v. *Grimes*, [1948] 2 All E. R. 147—*White* v. *White*, [1948] 2 All E. R. 151.—Nobody doubts that the recent decision of the House of Lords in *Baxter* v. *Baxter*, [1947] 2 All E. R. 886, noted in Vol. 12, p. 229, constitutes an important precedent on consummation of marriage. But according to the two cases under review the difficulty appears to be to decide for what principle *Baxter's Case* is a precedent. Both *Grimes'* and *White's Cases* were petitions for nullity brought by a wife on the ground of non-consummation of marriage through the husband's insistence on the practice of *coitus interruptus*. In the first case, which was undefended, Finnemore, J., granted a decree on the ground that "It is difficult to see how *coitus* which is *interruptus* can be said to be complete" (at p. 150); while in *White's Case* Willmer, J., two days later, after hearing argument on both sides, refused a decree of nullity on the ground that the marriage had been consummated, but granted a decree of divorce on the special facts of the case, which showed that the husband's conduct in persisting in this practice had so undermined his wife's health as to constitute cruelty. In both cases resort was had to the decision in *Baxter* v. *Baxter*, though in fact that case left open the point at issue in the present cases. Finnemore, J., reasoned that intercourse must be complete in order to consummate a marriage, even though conception might be artificially prevented, as in *Baxter* v. *Baxter*. Willmer, J., on the other hand, based his judgment on the belief that consummation took place as soon as there had been a complete conjunction of husband and wife, and supported his belief by the medical fact that conception could take place even though intercourse never reached its normal conclusion. As against this, however, it might be urged that the same result would be achieved by artificial insemination. On logical grounds the reasoning in *Grimes' Case* seems preferable; but it would be pointless to comment further at this stage, since as Willmer, J., remarked (at p. 154), the point involved is extremely difficult and one which will at some stage have to be decided by a higher tribunal. In the meantime, a wise precaution in suitable cases is to petition in the alternative for divorce on the ground of cruelty.

(Latey, p. 174.)

Divorce—condonation of adultery—whether condonation is a unilateral or bilateral act—the nature of reinstatement—Wilmot v. *Wilmot,* [1948] 2 All E. R. 123. The interesting point of whether a wife's misconduct could be condoned despite her unrepenting self arose, apparently for the the first time, in this case tried by Willmer, J., where it was held that condonation is a unilateral act of a forgiving nature, whether or not the guilty party desires his or her conduct to be condoned. This rather surprising decision was based primarily on the absence of any case laying down that condonation is a joint act or that there can be no condonation without the consent of the guilty party.

In *Fearn* v. *Fearn,* [1948] 1 All E. R. 459, noted Vol. 12, p. 307, the Court of Appeal, it may be remembered, reached the obvious conclusion that a wife could not be reinstated unless she had first been renounced. Willmer, J., distinguished that case on the fact that whereas in the earlier case the parties had been separated through the husband's service abroad at the date of the alleged condonation, in the present one they were living in the same house. In the opinion of the learned Judge (at p. 125), " It seems to me that it is a straining of language to say that there is no reinstatement because there has been no displacement. The displacement, in other words, may be merely a notional displacement, and it may be immediately made good by condonation or reinstatement on the part of the husband ". Though this view lacks the logical appeal of the reasoning in *Fearn* v. *Fearn,* it is a commonsense approach which accurately translates into legal effect the common facts of experience, and it may be hoped that the distinction thus drawn will be sustained.

(Latey, p. 124.)

Divorce—cruelty—whether malignant intention is required—Squire v. *Squire,* [1948] 2 All E. R. 51.—The decision of Finnemore, J., noted in Vol. 12, p. 148, has now been reversed by the Court of Appeal. It may be recalled that the cruelty complained of in this case consisted of the persistent conduct of a wife, who suffered from insomnia, in keeping her husband awake at night to read and talk to her, with serious effects on his health. No malignant intention was proved, and the husband's petition was dismissed.

The Court of Appeal has now largely substituted what may generally be called the objective test for the subjective one in respect of cruelty. In granting a decree to the husband, the Court held that the wife's conduct constituted cruelty on the " undisputed proposition that, generally speaking, a man is presumed to intend the natural and probable consequences of his acts " (*per* Tucker, L.J., at p. 53). Yet the force of this principle was mitigated both by Tucker, L.J., who made the reservation that in such questions the state of the parties' health was a relevant consideration; and by Evershed, L.J., who, while rejecting malignity as an essential in the present case, felt constrained to add, " I do not say that proof of such an intention may not be an important, or, in some cases, even an essential, consideration " (at p. 55). This leaves the law almost in worse confusion than before. If the objective test of cruelty is to be accepted, as in the instant case, then the introduction of questions of malignant intention in some cases as important, in others as essential, cannot but render the law uncertain until those exceptional cases are specifically defined. If, on the other hand, one cannot be guilty of cruelty without intending to be cruel, (the subjective test followed by Finnemore, J.,) there is at least a logical and consistent criterion on which to work, though doubtless the technical meaning of cruelty in its objective sense would cover far more cases of real hardship and overcome

many difficulties of proof of intention. In this respect it is a little difficult to appreciate the remarks of Hodson, J., in his dissenting judgment (at p. 59): "Unfortunately, at the trial the case appears to have been so conducted that the attention of the learned Judge was distracted from the true issue, *viz.*, whether or not cruelty had been established on the evidence, apart from the question whether or not the wife had the intention of being cruel": for once the subjective view of cruelty is accepted, as it was by Finnemore, J., whether the wife had the requisite intention becomes an integral part of whether cruelty can, in fact, be proved.

(Latey, p. 76.)

Estoppel in matrimonial causes—petition for divorce based on respondent's cruelty—previous finding of justices affirmed by Divisional Court—Hudson v. *Hudson,* [1948] 1 All E. R. 773.—The doubts and uncertainties inherent in the concurrent though dissimilar jurisdictions of justices and the High Court in certain matrimonial causes are generally evaded or resolved by the judicial convention of justices refusing to deal with a case in petty sessions when they are aware of the existence or imminence of proceedings in the same or a related cause in the High Court. Since *Knott* v. *Knott* (1935), 104 L. J. P. 50, the same convention has been generally observed by Divisional Courts on appeals from petty sessions. But obviously the practice cannot apply when the justices or the Divisional Court are unaware that other proceedings are contemplated, as in the instant case; and questions of whether the previous decisions are *res judicatæ* for the parties or the High Court demand an answer.

In this case justices, on the wife's complaint, had found the husband guilty of persistent cruelty, and their decision had been affirmed on appeal by the Divisional Court. On the wife's subsequent petition for divorce on the ground of the same acts of cruelty it was argued on her behalf that her husband was estopped by the decision of the Divisional Court from denying cruelty. Lord Merriman, P., again referred to the possibility of a distinction for this purpose between a judgment dismissing the cause of complaint and one finding the cause proved (*James* v. *James,* [1948] 1 All E. R. 214). Whereas the earlier dismissal of a charge may be conclusive (*Pratt* v. *Pratt* (1927), 96 L. J. P. 123), there could not in the view of the learned President be estoppel *per rem judicatam* where it was sought to rely on a previous conviction of a particular offence in support of a petition for divorce based on the same facts. It was held that the statutory duty of the Court to grant relief on being satisfied on the evidence that the petitioner's case has been proved (Matrimonial Causes Act, 1857, s. 31) removed the possibility of estoppel operating as a bar to the Court's inquiries. The natural consequence accepted by Lord Merriman, P., was that in such proceedings the Court should ascertain the evidence in the normal way; in other words, a previous decision finding certain facts proved did not operate as an estoppel even between the parties themselves. It is difficult on principle and on the reasoning adduced by the learned President to appreciate the distinction which he has suggested in this respect between the effects of previous decisions finding a person guilty of an offence and those dismissing the charge against him, unless resort be had by a rather tortuous distortion of analogy to the principle of criminal law that no person shall be twice put in danger of conviction for the same offence.

(Latey, p. 357.)

Estoppel—discretion of Court as to wife's costs of husband's appeal—Kara v. *Kara,* [1948] 2 All E. R. 16.—Lord Greene, M.R., carried a step further his judgment noted above on the effect of a decision on a question of fact of a Court of summary jurisdiction on proceedings involving the same facts in the High Court. In this case, the wife had obtained an order from justices on the ground of her husband's cruelty. The husband later petitioned for divorce for adultery, and the wife cross-petitioned for divorce on the ground of the acts of cruelty which had been the basis of the justices' order. The husband appealed to the Court of Appeal against the refusal of a decree in his favour and the granting of a decree in favour of his wife. The Matrimonial Causes Act, 1937, s. 62, allows the Court in divorce proceedings to treat as sufficient proof of the ground on which it was granted an order of justices under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1925, but nevertheless requires that the Court shall not pronounce a decree of divorce without receiving evidence from the petitioner. Dealing with the magistrate's finding of cruelty, Lord Greene remarked that, though for special reasons no estoppel was created in divorce cases (see judgment of Fletcher Moulton, L.J., in *Harriman* v. *Harriman,* 78 L. J. P. 62), " There may, however, be something less than an estoppel, *i.e.,* the findings may be treated as of strong probative value,". Thus the finding of a Court of summary jurisdiction that one of the parties to a divorce suit has committed a matrimonial offence, though admissible in evidence, " does not absolve the Court from examining the evidence given at the trial on the issues there raised " (*per* Lord Greene, M.R., at p. 17). The Court decided in fact that the charges of cruelty had not been proved to its satisfaction, and allowed the husband's appeal.

The order of the Court that the husband should pay the wife's costs of appeal with liberty to recover them from the co-respondent, (who was also ordered to pay all other costs), gave the Court an opportunity of stating some of the considerations affecting, though not limiting, the exercise of its discretion as to costs. Such matters include the wife's means; the desirability of allowing her to litigate a reasonable case—a case, that is, where she apparently has a reasonable chance of success—the importance of points of law involved; perjury by the wife; the discouragement of speculative actions; and misconduct in connection with the litigation. (Latey, pp. 357, 253–266.)

Divorce—costs against poor person—Olds v. *Olds, Brittan* v. *Brittan,* [1948] 2 All E. R. 61—*costs against co-respondent in absence of proof of signature on acknowledgment of service—Gilbert* v. *Gilbert,* [1948] 2 All E. R. 64.—Decisions of the Court of Appeal in these three cases are of importance on the minor questions with which they deal. In *Olds'* and *Brittan's Cases* unsuccessful husband respondents, who were defending as poor persons, had been ordered to pay costs on scales applicable to ordinary litigants. The Court of Appeal held firstly, that, by reason of section 31 (1) (*h*) of the Judicature Act, 1925, it had no jurisdiction on matters of costs, which were in the discretion of the trial Judge, unless the latter gave leave to appeal; and secondly, that under appropriate circumstances a poor person could be ordered to pay the full taxed costs of the opposite party, unless such party was himself suing as a poor person, or to contribute a fixed sum towards the other party's costs.

In *Gilbert* v. *Gilbert,* a case arising under rule 8 of the Matrimonial Causes Rules, 1947 (which permit service of process by registered post), the Court of Appeal held that it was not necessary, in order to award

costs against a co-respondent taking no part in the proceedings, that his signature on the form of receipt of a copy of the petition sent to him by registered post should be proved, as by identification of his handwriting. Those whose clients are affected by this provision should refer to the Court of Appeal's considered interpretation of the recent Rule.

(Latey, pp. 250 ff.)

Separation and maintenance order—whether estate of deceased husband is liable for arrears of maintenance—Re Bidie, [1948] 1 All E. R. 885.—In this case Jenkins, J., held that arrears of maintenance due under a separation order made by justices in favour of a wife could not be recovered against the estate of her deceased husband. But the law remains uncertain, for an opposite decision was reached by Sargant, J., in *Re Stillwell,* [1916] 1 Ch. 365, approved in *Re Maters* (1919), 88 L. J. Ch. 521, and followed in *Firman* v. *Royal* (1925), 94 L. J. K. B. 649. Supporting the present decision are the two cases, *Re Hedderwick* (1933), 102 L. J. Ch. 193 and *Re Woolgar* (1942), 111 L. J. Ch. 209, which Jenkins, J., regarded as destroying the effect of the earlier decisions. The basis of liability of the husband for his wife's necessaries lies in the common law, and is merely defined quantitatively by the order of justices under the Summary Jurisdiction Act, 1895, s. 5 (*c*). The statutory remedy (s. 9 of the Act), as the learned Judge agreed, does not exclude pre-existing remedies at common law. Despite the decisions supporting the view of Jenkins, J., it may well be that a quasi-contractual action on the order of the justices, a type of action not dying with the defendant, might still offer possibilities of the widow's cries not being made in vain.

The rejection of her second unsuccessful claim, under the Inheritance (Family Provision) Act, 1938, is noted *ante,* p. 65.

Adoption—county court order in favour of spouses later found to be bigamously married—Adoption of Children Act, 1926, *s.* 1 (3)—*Re Skinner,* [1948] 1 All E. R. 917.—The appeal in this case, in the words of Lord Greene, M.R., " raises a curious and important point under the Adoption of Children Act, 1926 ". The curiosity of the point arose on the question of whether any procedure existed for revoking an adoption order once made—a matter in which the Court of Appeal did nothing to allay the curiosity which its remarks aroused; while the importance lies in the decision that an adoption order must be respected until it is properly revoked, even though it was granted to two persons who subsequently are discovered to have been bigamously married.

The facts of this case are as clear as the law involved is obscure. S., the appellant, gave birth to an illegitimate child, of which C., the respondent, was the father. After the parents had gone through a ceremony of marriage, they petitioned in the county court to adopt jointly the illegitimate child. After normal inquiries had been made an adoption order was granted. (It does not appear why this procedure was considered necessary at the date of the adoption proceedings, as the child would have acquired the status of a legitimated child of S. and C. by virtue of their subsequent marriage.) Five years later C. was convicted of bigamously marrying S., and on the application of S. to the justices a maintenance order of 10s. a week was made against him as guardian of the child. This order was discharged by Vaisey, J., ([1948] 1 All E. R.

42) on the ground of invalidity of the adoption order; and from this decision the child's mother appealed.

Much of the argument turned upon section 1 (3) of the Adoption of Children Act, 1926, which reads as follows: "Where an application for an adoption order is made by two spouses jointly, the Court may make the order authorising the two spouses jointly to adopt, but save as aforesaid no adoption order shall be made authorising more than one person to adopt an infant". The Court of Appeal held that it was not within the province of either the justices or of the High Court (and *quære*, any Court?) to hold an adoption order invalid, unless the adopted child were fully represented in the proceedings for revocation of the order, as she had been in the proceedings on its making. For the effect of an adoption order was to change the status of the child as the person primarily affected by the order. The concept of status in its relation to the paramount consideration of the welfare of the infant was put in perspective by the Master of the Rolls in his words (at p. 920), "It might very well be thought by the Legislature that, in dealing with questions of status an order should remain a valid order when it has been made after proper investigations, notwithstanding that later on it is found that there was no jurisdiction to make it. This adoption order is not like a judgment for damages or anything of that kind. Status is a serious and important thing and it might well be thought to be more consistent with public policy that, once a status is purported to be changed, changed it should remain".

The Court of Appeal was not concerned to determine how, if at all, an adoption order could be set aside. Lord Greene, M.R., made two suggestions *obiter*; the first and, perhaps, the only remedy being *certiorari*, and the second, that either of the petitioners or the infant could get leave to appeal to the Court of Appeal, if necessary out of time. Somervell, L.J., was less optimistic, and considered it possible that such an order could not be set aside. In the absence of a new remedy provided by Parliament, and in addition to the possibilities suggested by the Master of the Rolls, it may still be possible in cases such as this to resort to the principle of fraud practised on the Court making the order (*Duchess of Kingston's Case* (1776), 2 Smith's L. C. (1903), p. 731), or even to resort to the fictitious procedure of a second adoption.

---

5. *LANDLORD AND TENANT CASES*

By Lionel A. Blundell, LL.M., Barrister-at-Law,
and John T. Plume, Barrister-at-Law.

Landlord and Tenant Act, 1927—claim for new lease or compensation—goodwill—landlord requiring premises for occupation by his firm—Clift v. *Taylor*, [1948] 2 All E. R. 113, was a case in which a tenant claimed a new lease or alternatively compensation for goodwill under sections 4 and 5 of the Landlord and Tenant Act, 1927. The landlord denied that there was any adherent goodwill and further sought to resist the tenant's claim for a new lease on the ground that he required the premises for his own occupation and that the grant of such a lease would not be consistent with good estate management, a defence provided by section 5 (3) of the Act. The landlord occupied adjoining premises through his firm, of which he was senior partner. The firm's business had expanded and more accommodation was urgently needed. The tenant contended that the

answer under section 5 (3) was not open to the landlord as he did not require the premises for his occupation but for the occupation of his firm. The material words of that subsection are "the grant of a new lease . . . shall not be deemed reasonable . . . (b) if the landlord proves (i) that the premises are required for occupation by himself . . ." The Court of Appeal held that the landlord required the premises for occupation by himself within the meaning of the subsection inasmuch as in law occupation by a firm is occupation by each and all the partners who are tenants in common. The Court further held that it would not be "consistent with good estate management" to grant a new lease on the ground that the landlord's firm needed the premises for its business. In the course of his judgment Scott, L.J., said, "we cannot imagine a clearer case of bad estate management than a decision by the senior partner to throw away the opportunity given him by the expiration of the teashop lease to bring that part of the premises within the firm's occupation."

On the question of goodwill the Court also found against the tenant. The tenant's business was that of a teashop, and he depended to a great extent for its success on his occupation of a nearby bakery which supplied him with cakes, etc. The Court pointed out that such goodwill as existed was dependent upon the occupation of the bakery by the tenant of the shop and was consequently personal goodwill and not adherent as would entitle the tenant to compensation. The Court emphasised certain underlying features of the Act which can be summarised thus: (i) Any real ambiguity of language in any particular provision, still apparent even when construed in the light of the whole Act, ought to be resolved in maintaining common law rights; and (ii) For the same reason, the plain meaning of the Act should not be strained in favour of any presupposed intention to enlarge the tenant's or to cut down the landlord's contractual rights.

(Woodfall, 24th ed., p. 1079.)

Landlord and Tenant Act, 1927—claim for new lease—previous offer by superior landlord—whether offer can be made over head of intermediate landlord—time limit.—The case of *Rackett* v. *Aston*, [1948] 2 All E. R. 19, stresses the importance of strict compliance with the formalities laid down by the Landlord and Tenant Act, 1927, in claims under that Act. The tenant held under a lease due to expire on May 8, 1949. His immediate landlord held under a lease from the freeholder and due to expire on May 9, 1949. The tenant served a notice under section 5 (1) of the Act on May 10, 1946, claiming a new lease or alternatively compensation. This notice was served quite properly on his immediate landlord, who forwarded it on May 23, 1946, to the head landlord. On July 18, 1946, the head landlord served a notice on the tenant direct pursuant to section 4 (1) proviso (b) offering to grant a new tenancy direct. The tenant did not accept the offer and in due course commenced proceedings for the grant of a new lease under section 5. It was argued against the claim that the non-acceptance of the previous offer debarred the tenant. Section 4 (1) proviso (b) enacts that a tenant shall not be entitled to compensation (which is a condition precedent to his claiming a new lease) if within two months after making his claim "the landlord" serves on him a notice that he is willing, etc., to grant him a new tenancy; and the tenant does not accept such offer within one month. The tenant's answer to this contention was twofold. In the first place he said that the counter notice was not served within two months and in the second place that it was not served by his (the tenant's) landlord. The Court of Appeal upheld both of these contentions and held that the tenant's

claim was not barred. The two months in which the counter offer could be made was ruled to be the two months from the date of service of the notice by the tenant on his immediate landlord and not two months from the date of service on the head landlord by the intermediate landlord. In the course of his judgment Scott, L.J., after referring to the definition of "landlord" in section 25 said, "The scheme of the Act is clearly to deal with each relationship of landlord and tenant between that tenant and his landlord, and for that reason, in my opinion, the notice of willingness to grant a new lease which gives the landlord the right to free himself from the obligation to pay compensation must be a notice from the tenant's immediate landlord to him." Not only must the counter notice be served on the tenant within two months of the making by the tenant of his claim, but the counter notice must be served by the tenant's immediate landlord. The Court was inclined to the view that the counter notice might be served direct on the tenant by the head landlord provided the latter expressed it to be on his behalf and also on behalf of the tenant's immediate landlord.

The wider question was also argued whether section 4 (1) proviso (b) has any relevance at all to a section 5 claim but was not dealt with by the Court in view of its decision on the above points.

(Woodfall, 24th ed., p. 1073.)

Rent Restriction Acts—meaning of the word "rent"—additional payment under supplemental deed—whether "rent" for purpose of determining standard rent.—In the case of *Alliance Property Co., Ltd.* v. *Shaffer* (1948), 64 T. L. R. 424, Slade, J., applied the case of *Property Holding Co., Ltd.* v. *Clark*, [1948] 1 All E. R. 165 (*Conveyancer*, Vol. 12, p. 238) to a case where the additional payments were payable not under the lease itself but under a supplemental deed. The standard rent fell to be fixed under section 12 (1) (a) of the 1920 Act as amended by the 1939 Act as "the rent at which the dwelling-house was let on September 1, 1939." On that date the house was let under a lease dated May 31, 1934, under which the rent was fixed at £175 per annum. There was a "supplemental" deed made on the same day and shortly after the lease by which the tenant was to pay annual sums of £40 and £60 towards the cost of repairs and alterations which had been carried out and towards the cost of management of the building of which the house formed a part. This supplemental deed provided that payments thereunder were to be made with and as rent under the lease, and were to be recoverable by distress. The supplemental deed was also to run concurrently with the lease and end when the lease was terminated. The learned judge held that the "rent" at which the house was let at the material date was the aggregate of the £175 under the lease, and the sums of £40 and £60 under the supplemental agreement.

(Rent Restrictions Guide, 2nd ed., p. 32.)

Rent Acts—rent including payments in respect of use of furniture—relevant date to be considered—rent reduced by Tribunal—whether letting taken out of protection of Rent Acts.—The main issue in the case of *Bowness* v. *O'Dwyer* (1948), 64 T. L. R. 367, was whether the tenant lost the protection of the Rent Acts when his rent was reduced by a Rent Tribunal. The original contractual letting was at a rent of 30s. per week; furniture to the value (as later found) of 3s. 6d. per week was included

in the letting. The tenancy was accordingly protected by the Rent Acts, the value of the furniture not forming a substantial part of the whole rent. The tenant then applied to the Rent Tribunal who reduced the rent to 8s. per week. The tenant then made a claim in the County Court alleging that the rent of 30s. per week yielded to the lessor a profit in excess of the normal profit and claiming repayment of the excess under section 9 (1) of the 1920 Act. The judge fixed the "normal profit" at 13s. 6d. per week and awarded the tenant repayment of the excess. It was agreed that on this finding the sum attributable to the furniture was 3s. 6d. per week. The landlord now claimed that, whether the rent which was properly recoverable was 8s. or 13s. 6d., the amount of the rent attributable to the use of the furniture, *i.e.*, 3s. 6d., formed a "substantial portion of the whole rent" and so took the letting out of the protection of the Acts under the provisions of section 12 (2) of the 1920 Act, as amended by section 10 (1) of the 1923 Act. The Court of Appeal rejected this contention and held, following *Jozwiak* v. *Hierowski* (1948), 64 T. L. R. 322, that the proper date at which to relate the weekly amount attributable to the use of furniture to the total rent payable was the date of the original contract. Consequently neither the determination of the Rent Tribunal nor the finding of the County Court judge brought about any decontrol so as to deprive the tenant of protection under the Rent Acts. It should be pointed out that the determinations of the Rent Tribunal and the County Court judge did not conflict with one another inasmuch as the County Court judge merely made an award for the repayment of past payment of excess rent. No order could, of course, have been made by the judge affecting present and future payments in view of the findings of the Tribunal and the provisions of section 7 of the Act of 1946. It would seem very open to argument whether the judge had any jurisdiction to make the order he did after the finding of the Tribunal (see section 7 of the Act of 1946); however, although this aspect of the case was raised, the Court expressed no opinion upon it.

(Rent Restrictions Guide, 2nd ed., p. 72 *et seq.*)

Rent Restriction Acts—sharing kitchen—sharing with another tenant—kitchen too small to be lived in.—Two decisions of the Court of Appeal and one decision of the Divisional Court clear up doubts which have been expressed as to the extent of the application of the decisions of the Court of Appeal in *Neale* v. *Del Soto*, [1945] K. B. 144, and the line of cases which followed. *Neale* v. *Del Soto* laid down the proposition that, where a tenant is given exclusive possession of certain rooms plus the user, jointly with the landlord, of certain other accommodation, including the kitchen, the letting is not of a "separate dwelling" within the meaning of section 16 (1) of the 1933 Act and consequently unprotected. It has now been decided that it matters not whether the sharing of the kitchen is between the tenant and his landlord or between the tenant and another tenant and also that it is immaterial whether the kitchen is capable of being used as a "living room" in the ordinary sense or whether it is so small as to be capable of being used for cooking purposes only. In *Winters* v. *Dance*, [1948] W.N. 317, the Court of Appeal considered the case where the room shared was a kitchenette of insufficient size to permit of its being used as a living room. Following *Kenyon* v. *Walker* (1946) 62 T. L. R. 702 (where the sharing of the kitchen was restricted to its use for cooking purposes only), the Court held that the letting came within the rule in *Neale* v. *Del Soto*, and was not protected. The authorities for the other proposition, that the letting is excluded from the protection of

the Acts whether the kitchen is shared by the tenant with his landlord or with another tenant, are: *Llewellyn* v. *Hinson* (1948), 64 T. L. R. 321 (C.A.), and *Banks* v. *Cope-Brown* [1948] 2 All E. R. 76 (Divisional Court).

(Rent Restrictions Guide, 2nd ed., p. 20.)

THE LIBRARY

Law Quarterly Review. April 1948.

An interesting analysis of the grounds on which the Court will hold the existence of fraud on a power. Frauds on a Power—an Opportunity for Stocktaking, by H. G. Hanbury. Also see Severance of Illegality in Contract, by N. S. Marsh, continued in the July number, *Modern Law Review,* July, 1948. An analysis and restatement of the law of mistake in contract: General Theory of Mistake in the Formation of Contract, by T. H. Tylor.

The Principles of Planning Law. By J. Charlesworth, LL.D., of Lincoln's Inn, Barrister-at-Law. Recorder of Scarborough. Second edition. London: Stevens & Sons, Ltd. 1948. xvi and 164 pp. (12s. 6d.)

We welcomed the original edition of this work as a most readable introduction. Owing to the Town and Country Planning Act, 1947, the work has had practically to be rewritten. The new edition is a clear and straightforward exposition, but it was written before the issue of the mass of Orders and Regulations that are so necessary to get a reasonably full picture of the whole. For those who want an outline of the new legislation in straightforward English this is it, but for conveyancers it lacks any attempt to bring this new law into alignment with the land law, and it does not include the Agriculture Act, 1947, part of which is essential to the whole scheme of planned land law. No doubt a new edition will be called for and we hold that Dr. Charlesworth will find time to produce something more adequate on the fundamental principles involved.

Landlord and Tenant. By the late Edgar Foa, M.A., Barrister-at-Law. Seventh edition. By His Honour Judge Forbes. London: Hamish Hamilton (Law Books), Ltd., 90 Great Russell Street, W.C.1. 1947. cliv and 969 pp. (75s. net.)

Foa's *Landlord and Tenant* had its own established place as a textbook and was so well known that it would call for a long review only if some material alterations had been made in its scope or treatment. This has not been attempted, and we would respectfully add that we agree with the learned editor in this. It is, however, contemplated that there will be annual supplements and to this end paragraphs have been numbered to facilitate reference. The index has been modernised and enlarged, and we have found in testing it that it is efficient.

The book remains confined to the principles of the law and so does not include either the Rent Acts or the emergency legislation. This must, of course, be borne in mind, and we are not sure how far this attitude can now be carried. It has become impossible to regard any part of this law as being permanent, and with regard to agricultural tenancies, the work is now already out of date because it does not deal with the Agriculture Act, 1947, now embodied in the Agricultural Holdings

Act, 1948. Likewise the Town and Country Planning Acts are omitted, though not all of the Public Health and Housing Acts. The 1947 Act undoubtedly has very marked effects on the law of leases, but it is, perhaps, early days to say really how far these effects will go. The fact remains that the Common Law of landlord and Tenant is increasingly entangled with these statutory modifications and variations, and it is going to be increasingly difficult to determine what are the principles.

The last edition of Foa was issued in 1924 and a new edition would have appeared nearly ten years ago but for the war, nevertheless, the problem must soon be faced whether a book built up in the days of the dominance of the Common Law is to stand. In our view, the present edition is very valuable to practitioners. It cannot be used alone because of its omissions but it does contain a masterly and well-thought presentation of the principles into which the new law must be worked.

The Law of Negligence. By JOHN CHARLESWORTH, LL.D., of Lincoln's Inn and the North Eastern Circuit, Barrister-at-Law. Second edition. London: Sweet & Maxwell, 3 Chancery Lane. 1947. lxxxviii and 661 pp. (70s.)

This is a new edition of a work that has met ready acceptance for its clarity and exhaustive treatment. The new edition is to be kept up to date by supplements. The many decisions that are being made in this branch of the law have been incorporated but otherwise, apart from a new chapter on "Contracting out of the ability for negligence", the character of the work has not been changed. It is, therefore, necessary only to say that the developments in this branch of the law are so rapid that a new edition should be welcomed by all practitioners, and to remind conveyancers that notwithstanding its title it contains many matters closely affecting them since it deals with dangerous premises and the matters usually treated under the head of the Rule in *Rylands* v. *Fletcher.* It should, therefore, find a place on their shelves as a really modern and full exposition of these topics.

Apportionments for Executors and Trustees. By J. F. JOSLING, Solicitor, assisted by C. CAPLIN, LL.B., Oyez Practice Notes No. 5. London: Solicitors' Law Stationery Society. 28 pp. (2s.)

This pamphlet is the sort of work that can be kept on the desk of anyone concerned with trust accounts. It sets out the rule and exemplifies its application. It also sets out the grounds on which it will not be applied. It is all very simple and clear cut. For the ordinary case it is a most convenient and simple exposition on a subject that is tiresome and in its more intricate cases difficult. It deals primarily with statutory apportionments: *Howe* v. *Dartmouth, Chesterfield's Case, Allhusen* v. *Whittell, Re Atkinson,* and *Re Bird.* In our view, the most valuable part is that which gives specimens of the application of the rule.

Jeremy Bentham and the Law. A Symposium. Editors: KEETON and SCHWARZENBERGER. London: 1948. Stevens & Sons. (20s.)

Jeremy Bentham has been the victim of his own greatness. So many of his proposals have become enacted law that it is difficult for us to summon up enthusiasm for projects which today have an antique ring. The broader ideas which underlay his specific proposals sometimes lacked their merit, certainly inadequate attention has been paid to them and one would have wished that Prof. Friedmann's learned article had been a little more extensive on this point, the importance of which he emphasises. Necessarily this book, in view of its purpose and occasion, gives us more light on Bentham as a man and an influence than on the familiar details of his legislative drafts. It was certainly time that this many-sided genius was properly appreciated in his own country, and unstinting praise is due to all the learned

contributors who demonstrate a confident grasp of fields far removed from the technicalities of law, and a high standard of historical and literary scholarship. It would be invidious to adopt any other principle of selection in this limited space than the field of interest of the readers of this journal. To the conveyancer Bentham poses a particular problem. It was Blackstone's lectures on Real Property which inspired Bentham with his first hatred for the defective condition of the law. It was conveyancing which he boasted he had most completely forgotten (cited Jolowicz, p. 5, note 18). Not least among the targets of his invective was the "verbosity" of conveyancers (Graveson, p. 119). As a reformer of a revolutionary cast Bentham opposed the peculiarly strict adherence to technical law which marks the responsible draftsman of conveyances. The conveyancer may, in return, point to the mixed success of Bentham's own constructive draft proposals, to his dilettantism, to his refusal to undergo any single technical discipline, to his irresponsible fulminations from retirement from all legal duties and legal practice. The answer to this problem seems to be that the expert lawyer should not become so lost in his own technique as to leave the responsibility for reform to those less skilled in law and less experienced in life. One of the happier phases of Bentham's reforms was the agreement of the contemporary Real Property Commissioners with his project for registration of title to land, cited by Professor Graveson (p. 119). But this support was small in contrast with that which his ideas received in India (Prof. Vesey-Fitzgerald, p. 226), and in the younger American States (Prof. Everett, p. 194). Bentham has often been described as a prophet, and the gulf between "the law and the prophets" has been too great for him to win the plaudits of his own profession.

A. Kiralfy.

EXISTING USE VALUE

ACQUISITION BY THE CENTRAL LAND BOARD

The following correspondence has been issued for publication:—

The Rt. Hon. Lewis Silkin, M.P.,
Ministry of Town and Country Planning.
September 17, 1948.

My dear Minister,

The Central Land Board are disturbed about the fact that land is still being sold deliberately in very many cases at a sum equivalent to a price inclusive of development value. The Board accept as generally accurate the statement in a recent letter to the *Times* that "the professed object of the Act to secure that land shall be freely transferred at its existing use value is just not being achieved".

It is becoming increasingly common (to quote the same letter) for "the purchaser to pay what was thought to be a fair pre-Act price and to take an assignment of the vendor's right to claim compensation for depreciation arising as a result of the Act". If the pre-Act price of a plot were £200 and the existing use value is £50, the owner is selling at £200 and granting an assignment of his claim on the £300,000,000. The purchaser then becomes liable on development to pay to the Board a development charge of about £150. This makes the *immediate* price payable for the land a sum of £350, with a *later* right to be recouped whatever is payable out of the fund of £300,000,000.

There is a very real risk in transactions of this type that one of two things may happen. The inflated immediate price paid for the land will be added to the cost of the building and will be passed on to the person who is to occupy the building in a higher sale or letting price. Alternatively developers will refuse to buy the land at such a price, and approved and urgent development will not be carried out.

The Board, your Ministry and also you and I myself have used every possible chance to explain to the land-owning and land-buying public the importance of the establishment of existing use value. I am reminded of a story told of one of our Judges. He was being addressed by a young advocate accustomed to jury cases

and repeated himself unduly. The Judge warned him once that he was not addressing a jury and then, rapping on his desk, said to the usher, "Usher, turn on the light over the jury box, Mr. —— doesn't believe me". The public doesn't seem to believe us and more light is essential.

The main sanction provided in the Act to establish existing use value on sales is the power given to certain public authorities to purchase the land. Section 43 gives to the Central Land Board, subject to your approval, certain powers to buy land by agreement and by compulsion. A sum of £100,000 has been allotted for this purpose in the Vote for the Central Land Board up to April, 1949.

As a first step (and in the earnest hope that further steps on a large scale will not be necessary) the Board have decided to ask your approval, in principle (within the limits of their present Vote), for the purchase by the Board under section 43 (1) by agreement of land where the Board is satisfied that land is deliberately being offered for sale or has been bought at a price considerably above existing use value, including cases where this is coupled with an assignment to the purchaser of the vendor's claim on the £300,000,000. Your further approval would, of course, be sought on each individual case, when a full statement of the facts and circumstances would be sent to you. In appropriate cases the owner would be informed that the Board would not wish to purchase the land if an undertaking were given that his land would be sold at existing use value. Reference would also be made to the powers of the Board for compulsory purchase.

The Board had hoped to operate the Act without the threat or the use of land purchase—at any rate in the early days. But they are satisfied that many owners are as a matter of considered policy advertising and actually selling land on terms which will make the Act difficult or impossible to operate and which are not fair to prospective developers. They feel bound, therefore, to take this early action if you approve.

Yours sincerely,

MALCOLM TRUSTRAM EVE.

SIR MALCOLM TRUSTRAM EVE, BT., M.C., T.D., K.C.
CENTRAL LAND BOARD.
September 21, 1948.

My dear Chairman,

Thank you for your letter of September 17.

It is, I absolutely agree, vital to the operation of the Town and Country Planning Act that land should be bought and sold at existing use value. I myself know of cases where approved development has already been hindered by the price asked for the land, although planning permission had been granted.

I am in entire agreement with the policy proposed in your letter, and I hope that the Board will exercise to the full extent necessary the powers conferred upon them by section 43 of the Act. When the Bill was before Parliament it was expressly stated that these powers had been included for this very purpose.

I shall of course have to consider on its merits any particular proposal that the Board may submit to me for my approval under the section.

Yours sincerely,

LEWIS SILKIN.